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ADOLPH GOLDSCHMIDT, ABRAHAM MORRIS,
DELLA BRANDSTETTER, HENRY MORRIS,
DOROTHY M. NATHAN, AIMEE M. MORRIS,
MARK LEVY AND ARTHUR G. LEVY,

Plaintiffs and Appellees,

v.

D. F. WAGGONER, BEN MEYER and MORRIS
RATSKY, RATSKY SERVICE STATION, INC.,
a Corporation,

Defendants,

MUNICIPAL COURT

OF CHICAGO.

On Appeal of RATSKY SERVICE STATION, INC.,
a Corporation,
Co-Defendant and Appellant.

273 I.A. 609¹

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Ratsky Service Station, Inc., from a judgment of the Municipal Court of Chicago in an action of forcible detainer brought against it and three other defendants for the recovery of the possession of certain real estate in the city of Chicago. Nothing is before the court but the common law record consisting of the pleadings, process, appearances, finding and judgment. There is no certificate of evidence or bill of exceptions. In the suit as originally commenced, the defendant was not made a party. Subsequently, the complaint was amended by adding the name of Ratsky Service Station, Inc., as party defendant. Summons was issued, placed in the hands of the bailiff of the Municipal Court who served it, and filed in the office of the clerk of such court the following return:

"Served this writ on the within named Ratsky Service Station, Inc., by delivering a copy thereof with a copy of the complaint filed therein attached to Morris Ratsky of said corporation, and at the same time informing him of the contents thereof, etc."

This return further recites that none of the officers or other agents of the corporation were found in the city of Chicago. Subsequently, The Ratsky Service Station, Inc., entered a special appearance "for the sole and exclusive purpose of attacking and subjecting to the jurisdiction of this * * * Court over the person of the said Ratsky Service

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THESE THINGS ARE THE SAME AS THOSE WHICH WERE
THE SUBJECT OF THE REPORT OF THE COMMITTEE
ON THE 15TH OF MARCH, 1891.

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ON THE 15TH OF MARCH, 1891.

Station, Inc., a Corporation."

The finding of the court and the judgment appealed from as originally entered were as follows:

"Trial by Court. Finding Defendants, D. E. Aggoner, Ben Meyer, Morris Katsky, guilty withholding premises described in complaint.

This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment herein on the finding herein, and that the plaintiff have and recover of and from the defendants, D. E. Aggoner, Ben Meyer, Morris Katsky, Katsky Service Station, Inc., a Corp., possession of the premises described in the complaint herein, and known as Northwest corner of West Jackson Blvd. and South Sangamon Sts., and that a writ of restitution issue therefor."

After the record, briefs and abstract were filed in this court, appellees appeared in the Municipal Court and moved that court to amend its finding by adding certain words alleged to have been omitted by the court through a clerical error in making its original entry. This motion was allowed and the court entered the following order:

"This matter coming on to be heard on the motion of Adolph Goldschmidt, et al., plaintiffs herein, by Mergentheim & Lee, their attorneys, and on due and proper notice to counsel for defendants, and the court having heard the arguments of counsel and being fully advised in the premises, does find:

That by clerical error of the clerk in transcribing the order of the court, the words "and Katsky Service Station, Inc., a corporation" were omitted in the finding of the court entered in the above entitled cause; and that the words "of unlawfully" were likewise by clerical error of the clerk omitted after the word "guilty" in said finding of the court; and that the word "plaintiff" was, by clerical error, written in lieu of the word "plaintiffs" each time it appears in the judgment entered herein; and that the order of said finding made by the court at the time of the trial of the above entitled cause and at the time of the making of said finding by the court, and the files in said cause show that the said words "and Katsky Service Station, Inc., a corporation" and said words "of unlawfully" were omitted by clerical error of the clerk as aforesaid; and that the word "plaintiff" each time it appears in the judgment entered herein was by clerical error written instead of the word "plaintiffs";

Now, therefore, it is hereby ordered nunc pro tunc as of November 4, 1931, that the record of the finding entered in the above entitled cause be corrected in conformity with

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the aforesaid memoranda made by the court, to read as follows:

'Trial by Court. Finding defendants, D. I. Waggoner, Ben Meyer, Morris Katsky and Katsky Service Station, Inc., a corporation, guilty of unlawfully withholding premises described in complaint';

And it is further ordered, nunc pro tunc, as of November 4, 1931, that the record of the judgment entered in the above entitled cause be likewise corrected by the addition of the letter "s" to the word plaintiff wherever it appears therein.

Dated May 19th, A. D. 1933.

ENTER:

John F. Haas,

JUDGE

Thereafter, appellees moved for leave to file an additional and supplemental record in this court showing such amendment. This motion has been reserved to the hearing, and we will dispose of it before considering the appeal on its merits. It will be observed in this order the court finds that it had before it sufficient memoranda to justify the entry thereof. The judgment as entered is against all the defendants, including appellant. This alone would be sufficient memoranda from which the court could amend the finding. The motion of appellees for leave to file the additional record is allowed.

In its brief appellant urges that the service of the summons on defendant, Katsky Service Station, Inc., a Corporation, by delivering a copy of the complaint to Morris Katsky of such corporation, is not the service on a corporation, required by the statute, and that the court had no jurisdiction of defendant. The only step taken by this defendant in the court below to have this question passed upon was to file an appearance, as said, "for the sole and exclusive purpose of attacking and objecting to the jurisdiction of Honorable Court." There was no motion made to quash the return or to otherwise raise the question as to the court's jurisdiction over the Katsky Service Station, Inc. The finding of the court indicates that a trial was had of the cause on its merits, and that a bill of exceptions was presented to

the trial court.

In First National Bank v. Bank of Meratio, 255 S. E. 881, (Ark.) the Supreme Court of Arkansas held that a constructively served defendant, who appeared especially to move to quash the service, abandoned the motion by not requesting a ruling before or at the time the cause was submitted to the court.

After the short record containing only the pleadings, process, appearances, finding of the court and the judgment were filed in this court, defendants filed a motion supported by a sworn petition, praying that a writ of mandamus issue, directed to the judge who tried the case in the Municipal Court, commanding him to sign, seal and file of record, petitioner's bill of exceptions. This petition was denied. The petition for mandamus is a part of the records here, and its context shows that defendant, Aetasky Service Station, Inc., a Corporation, participated in the trial of the case in the court below. The entry of the special appearance of the defendant was only for the purpose of questioning the jurisdiction of the court - because of the alleged faulty service as suggested - and it needs no stretch of the imagination to determine that a bill of exceptions was not desired for the purpose of raising any jurisdictional question, based on the alleged faulty service, but to present the issues raised on the trial. Objections to the service of process are waived by a general appearance. Kinsella v. Gahn, 185 Ill. 208.

We see no reason for disturbing the finding and judgment of the court, and the judgment is, therefore, affirmed.

AFFIRMED.

WILSON AND REBEL, JJ. CONCUR.

35878

H. E. HACKERLE,

Appellee,

v.

LOUIS NIES, WALTER J. NAY and
WILLIAM E. SWINK,

Defendants

LOUIS NIES,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 609²

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE SALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by Louis Nies from a judgment of the Municipal Court of Chicago against Louis Nies, Walter J. Nay and William E. Swink, defendants in a proceeding brought to recover a balance claimed to be due under an oral agreement alleged to have been entered into between plaintiff and defendants for the sale by plaintiff to defendants of certain gas and oil leases in the state of Kansas. The third amended statement of claim upon which the cause was tried charges that on the 14th day of August, 1930, plaintiff sold to the defendants 17 oil gas leases for the sum of \$11,000.00, on account of which defendants paid plaintiff \$1,500.00 in cash and orally agreed to pay the balance in installments of \$2,500.00 on September 30th, 1930, \$2,500.00 on October 30th, 1930, and \$4,500.00 on November 30th, 1930, together with interest at the rate of 8% per annum from the time such deferred payments became due, until paid; that the assignments of such leases were to be made to the defendant, Walter J. Nay, and delivery of such assignments made by forwarding same to the Sheridan Trust & Savings Bank, Chicago, Illinois, on or before August 30th, 1930. The statement of claim alleged that plaintiff did deliver copies of these leases, together with the assignments thereof, as agreed; that defendants entered into possession of the lands covered by the leases, and were in possession at the time the

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1. The first group of people who are interested in the study of the history of the world are the historians. They are people who study the past and try to understand what happened and why it happened. They use a variety of sources, including books, documents, and artifacts, to reconstruct the past. They also try to understand the people who lived in the past and how they thought and felt. Historians are interested in the history of the world because it helps them to understand the present and the future.

suit was instituted, and that the balances agreed upon had not been paid.

By his separate affidavit of merits, the defendant, Louis Nies, denies that he entered into any oral or written contract with plaintiff, together with the other defendants or otherwise, for the purchase of these leases, or that he agreed to pay the sum mentioned in the statement of claim, or any other sum, or that he was ever a party to any contract, oral or written, by the terms of which defendant purchased, or agreed to purchase, any leases of any such lands, or that he entered into possession of the lands mentioned. This affidavit of merits further recites that the defendant, Louis Nies, is not liable because the alleged oral promises, if made, constituted an agreement not to be performed within a year, were promises to answer for the debt of another, to wit:- Walter J. May, and were for the sale of goods and choses in action of the value of \$500.00 and upward, and, therefore, because of each of such defenses, the action of plaintiff is barred by the Statute of Frauds.

H. E. Wackerle plaintiff, testified that on August 13th, 1930, the three defendants called upon him at his office in Edna, Kansas, and requested to be shown certain gas properties; that plaintiff, together with the defendants and a man named Brannon looked at the properties; that they returned to the office of the plaintiff and the defendant Nies made an offer of \$11,000.00 for these leases and that the plaintiff agreed to accept that amount; that defendant Nies expressed a desire that defendant May act as trustee in the transaction, and that plaintiff was instructed to assign the leases to Mr. May, and that after the assignment was made the leases were to be sent to the Sheridan Trust & Savings Bank of Chicago, Illinois; that on August 14th, 1930, he received a check on account from Mr. Nies for \$1,500.00. The record shows that thereafter on the same date plaintiff and defendant May entered into what is called a sales agreement, which was signed

by plaintiff and defendant May, in which it is recited that the party of the first part, meaning plaintiff, will sell, and the party of the second part, meaning the defendant May, will buy the oil and gas leases referred to for the price of \$11,000, \$1,500.00 in cash, the receipt of which is acknowledged by the agreement, the balance to be evidenced by three notes, one for \$2,500.00 due September 30th, 1930, one for \$2,500.00 due October 30th, 1930, and one for \$4,500.00 due November 30th, 1930, all of the notes to draw interest at the rate of 8% after maturity, and that the assignment of the gas leases was to be delivered to the Sheridan Trust & Savings Bank of Chicago, Illinois. These notes were executed by May, delivered to plaintiff, and the agreement and the notes are a part of the record herein.

Thereafter on August 27th, 1930, the three defendants, Louis Nies, Walter J. May and William E. Swink, entered into a written agreement between themselves, signed by each defendant, in which it is recited that on or about the 14th day of August, 1930, the three defendants had made a verbal agreement between themselves to purchase for their joint benefit certain oil and gas leases of lands located in Labette County in the state of Kansas from H. E. Wackerle of Edna, Kansas, upon certain terms and conditions; that defendant Nies had advanced the sum of \$2,000.00 on behalf of himself and the other two defendants, \$1,500.00 of which was to cover the first payment on such leases, the balance to be used in drilling a well, and that the purchase contract for these leases had been taken in the name of May, who held the leases for the benefit of himself, Nies and Swink. This agreement entered into between these three defendants contains the details of mutual arrangements and agreements between the three defendants concerning these gas land leases.

Defendant Nies testified that on the 14th day of August, 1930, he and defendants, May and Swink and a man named Brannon, called upon the plaintiff, and at that time there was no partnership arrange-

ment between Nies and defendants, Seink and May; that there was some conversation about the gas properties, and that Nies told plaintiff that he was not interested if it meant an investment of cash. Defendant further testified that he left the conference and that defendant May came out to him and told him that he, May, had bought the property, and that the defendant then told May he was not interested and would not sign any papers; that he then went to the plaintiff, asked to see the contract entered into between plaintiff and defendant May, and there told plaintiff he would have nothing to do with the matter and that he was not interested. Defendant Nies further testified that at that time he was indebted to May in approximately the sum of \$3,100.00, and that at May's request he drew a check for \$1,500.00 to enable May to make the first payment due to plaintiff under the contract entered into between the plaintiff and May. Nies further testified that when he signed the agreement entered into between the three defendants on August 27th, 1932, he was not aware of the fact that it contained recitations to the effect that these three defendants had entered into an oral contract concerning these leases, and that May held the title to the leases for the benefit of all three.

The point is made by this defendant that plaintiff cannot recover until the notes given to plaintiff by May are surrendered. The record on these notes is that they were produced in court by plaintiff's attorney upon request of defendant Nies. The trial court permitted the notes to remain in the possession of plaintiff's attorney, with the following assurance given by him, to-wit:

"Well, as far as our assurance is concerned, I give the Court the assurance that nothing will be done on these notes until the upper court has made a ruling on this case if the case should go up to the upper court, and as far as any other liability of Mr. May is concerned, the defense of res adjudicata would be a perfect defense."

Appellant's proposition is that where there is an action upon an account for which a note is given, the plaintiff cannot recover unless he produces the note upon the trial and offers to deliver it up

or shows that it has been lost or destroyed, and the reason is, that the law will presume the note has been paid or put in circulation if it is not produced. (Holand v. Fletcher, 30 Ill. 324.) In the instant case none of these presumptions are present. The notes in question were produced in court on the part of defendant Nies, and by the trial judge permitted to remain in the custody of plaintiff's attorney, pending this case. Further, we can see no possible situation arise where there can be any liability on these notes on the part of Nies.

As to the defense of the Statute of Frauds, we have only this to say: The contract was fully performed on the part of the plaintiff, the down payment had been paid by the check of defendant Nies, and if he is liable at all, nothing remains to be done but pay the money. This defense has no merit. In McDonald v. Crosby, 132 Ill. 383, the Supreme Court said:

"As to the first, the demurrer was properly sustained on the ground that the contract declared upon was fully and completely performed upon the part of the plaintiff, and nothing remained to be done by the defendants but to pay the money. (Curtis v. Sage, 35 Ill. 23.) We do not understand under the rule in this state that the Statute of Frauds can be interposed as a defense where the contract is fully performed on the part of the plaintiff, - in other words, the Statute of Frauds cannot be availed of for the purpose of perpetrating a fraud."

The contract signed and executed by Nies and the other two defendants on August 27th, 1932, contains an admission of the facts upon which plaintiff's case is based, and Nies cannot escape liability by the claim that he did not know what he was signing. There is not a suggestion in the record that his signature was obtained by fraud or duress.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

WILSON AND REBEL, JJ. CONCUR.

36305

JOHN DAVIES,

(Plaintiff) Appellee,

v.

EDWIN E. HUSAK and C. S. ROOT, doing
business as HUSAK & ROOT,

(Defendants) Appellants.

APPEAL FROM

MUNICIPAL COURT

273 I.A. 609
OF CHICAGO.

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for \$820.74 recovered in a suit by plaintiff against defendants, wherein plaintiff claimed that defendants were indebted to him for work done under a written contract between the parties.

The written contract upon which the suit is based is dated November 13th, 1930. The defendants were the general contractors in the erection of a building for the city of Chicago, and the plaintiff a sub-contractor. By the terms of the contract, plaintiff agreed to lay certain brick and stone and install certain iron work in the construction of the building at prices stated therein, and that the work was to be completed not later than December 10th, but the contract does not say what year. It is also provided among other things that should the subcontractor be delayed in the prosecution and completion of the work by any act of neglect, delay or default of the contractor or the architect, or any other sub-contractor employed by the contractor, that the time for the completion of the work should be extended for a period equivalent to the time lost, but that no allowance should be made unless a claim therefor be presented in writing to the contractor within 24 hours after the occurrence of such delay, and if the parties could not agree upon the length of such extension, such question should be decided by arbitration, as provided. By the terms of the contract, the contractor was to furnish all materials, and it provides that in the event of failure in that direction, then the contractor is to reimburse the sub-contractor for any loss caused

thereby, and if the sub-contractor delayed the material progress of the work so as to cause damage to the contractor, that he, the sub-contractor, should be liable for any such damage. It is further provided that the final certificate or final payment should be conclusive evidence of the performance of the contract, and also that if the parties could not agree upon the work to be added or omitted, or upon the amount of any damages to either of the parties, or as to any of the matters contained in the contract, that any such failure to agree should be submitted to three disinterested arbitrators and that the decision of any two of them should be binding.

The affidavit of defense avers that plaintiff did not complete the contract until January 10th, 1931, which was not the date agreed upon for completion; that plaintiff had not completed such contract in accordance with other terms; that no agreement could be or was reached between the parties as to the amount due or damage claimed by the plaintiff, and that the plaintiff had refused to arbitrate, and, therefore, could not recover, and further that the plaintiff had not performed the contract to the satisfaction of the defendants or of Paul Gerhardt, Jr., the city architect, without whose final certificate defendants insist that by the terms of the contract, plaintiff had no right of action. The amount of work done and materials furnished are testified to by plaintiff and are not disputed, nor is it disputed that the prices charged are those fixed by the contract. It is not claimed that plaintiff's work was not done according to the contract, except for some delay in completion.

Plaintiff on his part insists that the reason the contract was not completed earlier was because of the delay of the defendants in furnishing material as required. It is also insisted by plaintiff that there was a further delay occasioned by the agents and representatives of the city of Chicago, who ordered and caused the work to be suspended on account of bad weather and holidays. No damage

is claimed by plaintiff for either of such alleged delays. Whatever may have been the cause of the delay, whether by the fault of plaintiff or the defendants, or the agents of the city of Chicago, the record shows that the work to be done under the contract between the defendant and the city of Chicago had been done, including plaintiff's portion thereof, and that a final voucher was issued by the city of Chicago to defendants for the sum of \$12,165.00 which included the payment for the work done by the plaintiff. There is no suggestion in the record of any objection being made by any representative of the city of Chicago that the work was not satisfactorily done, and from the fact that the certificate upon which this voucher was issued was signed by Paul Gerhardt, Jr., city architect, and other city officials, we draw the conclusion, because there is nothing to the contrary, that not only was the contract between the main contractors and the city of Chicago fully performed, but that the work agreed to be done by plaintiff had also been fully performed. Neither is there any claim made, nor is there a suggestion in the record that defendants suffered any definite loss by reason of any claimed delay in the performance of the work by plaintiff. The defense^{is} urged that plaintiff was obliged to submit his claim to arbitration before he can maintain this action, but to this we do not agree. During the trial defendant moved for leave to file an amended affidavit of merits setting up an entirely different defense than that set up in the original, which the court denied. In the exercise, by the court, of its discretion, in this regard, there was no error.

The trial court heard the witnesses, and we see nothing in the record which would justify this court in reversing the judgment. The judgment is affirmed.

AFFIRMED.

WILSON, AND NEBEL, JJ. CONCUR.

[illegible]

36336

ANNA FLESKA, a minor by SOUTH CHICAGO
SAVINGS BANK, a Trust Corporation her
duly acting and appointed guardian,

Appellee,

v.

GRAND CASSIOLIAN SLOVENIAN CATHOLIC
UNION OF THE UNITED STATES OF AMERICA,
a Corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 610

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against defendant in a suit brought by plaintiff as guardian for Anna Flesha on a certificate of insurance dated August 24th, 1919, and Joseph Flesha, the father of Anna and Mary Flesha, by a fraternal insurance society, known as the Beared Heart of Jesus, Branch No. 166.

The statement of claim sets forth that it is provided in this certificate that upon the death of the member, \$400.00 should be paid to Anna Flesha and \$400.00 to her sister, Mary Flesha. It is further alleged that Mary Flesha predeceased her father and sister, and that by the terms of the certificate upon the death of Joseph, the whole amount thereof became payable to plaintiff as guardian of Anna Flesha.

In the affidavit of merits filed by defendant, it is alleged that on June 20th, 1925, after the issuance of the certificate sued on, Joseph Flesha, the insured, contracted a civil marriage and cohabited with his wife; that there was in effect at the time of the death of the insured a by-law of this society which provided that "Whoever shall enter into a civil contract of marriage he shall thereby ipso facto expel himself or herself from the Union. The persons who do not belong into any Catholic Parish or Church . . . shall likewise be ineligible for membership in this organization;" that by such marriage Joseph Flesha violated such by-law and thereby

2231A-610

CHURCHILL HILL, DEC. 18, 1935

My dear Mr. Churchill,
This is my second letter to you. I am sorry that I have not been able to write to you more often. I have been very busy with my work, but I have managed to find some time to write to you. I am sure that you will be interested in the things I have to tell you. I have been thinking about you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been very busy with my work, but I have managed to find some time to write to you. I am sure that you will be interested in the things I have to tell you. I have been thinking about you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy.

I am sure that you will be interested in the things I have to tell you. I have been thinking about you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy. I have been very busy with my work, but I have managed to find some time to write to you. I am sure that you will be interested in the things I have to tell you. I have been thinking about you a great deal lately, and I have been wondering how you are getting on. I hope you are well and happy.

ceased to be a member in good standing in such society, and that, therefore defendant was not liable under the certificate sued on.

It was stipulated on the trial that Joseph Flesha became a member of the society as alleged on August 24th, 1919; that the certificate of insurance sued on was issued to him, payable after his death to his daughters, Anna Flesha and Mary Flesha; that Joseph Flesha died on July 5th, 1931, and that his daughter, Mary, predeceased Joseph Flesha, and that Anna Flesha is now sole beneficiary under such certificate; that in case of the death of a member when one or more of the beneficiaries are not living, the entire sum of the deceased beneficiaries shall vest in the remaining beneficiary, and that the South Chicago Savings Bank is the duly qualified guardian of Anna Flesha, plaintiff; that Joseph Flesha was married to one Anna Scott on July 30th, 1928, by a Justice of Peace in Crown Point, Indiana, and that the marriage was not solemnized or ratified according to the rules and regulations of the Roman Catholic Church; that there was in force on January 1st, 1937, a by-law of such society which provided that "Whoever shall enter into a Civil Contract of marriage, he shall thereby ipso facto expel himself from this Union;" that on January 1st, 1931, there was another by-law in force, which provided that "Whoever shall enter into a Civil Contract of marriage, he shall thereby ipso facto expel himself or herself from the Union. In the event that such member paid any assessments after such expulsion, the same shall be returned to him without interest."

It is further stipulated that there was a child born of such marriage, which child was baptized according to the Roman Catholic ritual; that Anna Flesha is the child of plaintiff by a former marriage; that his first wife died September 5th, 1919; that the insured and his second wife separated in September, 1926, and did not live together thereafter; that the insured was visited by a Roman Catholic priest and received the last rites of the Roman Catholic Church

[illegible]

just prior to his death, and that he was buried by the Roman Catholic Church in a Roman Catholic cemetery. It is further stipulated that such by-laws provide the following objects of the organization; "To preserve among its members the Holy Catholic religion, thus promoting their eternal (spiritual) happiness. Be vigilant, that all members perform their religious duties and the duties of citizenship, thus to improve the society of mankind. A member who does not live the life of a good Catholic or lives in open state of adultery, or neglects to receive the Holy Sacraments during the Easter period, or does not support the parish church, wherever he is a member, or does not send his children to a Catholic school, wherever same is possible, shall be expelled from the Union if it be so proven." It is further stipulated that the following rules and regulations of conduct are a part of the official Canon law of the Roman Catholic Church and were a part thereof in the year 1925 and prior thereto:

"Only those marriages are valid which are contracted before a parish priest or the local ordinary or a priest delegated by either of them and at least two witnesses.

That marriages contracted by Catholics outside of the church, i.e., clandestine marriages are not only illicit but absolutely invalid. That Catholics may not marry before Civil magistrate, commonly called a Squire.

That a member of the Roman Catholic Church is not excommunicated from the Church by reason of entering into a marriage performed by a Civil magistrate. Such member is ipse facto excommunicated from the Church by reason of entering into a marriage performed by a priest or minister of another religion."

The Rev. John Plevnik of Joliet, Illinois, Spiritual Director of the defendant society, a witness offered by defendant, testified that a person married by a civil magistrate and not a Catholic priest ceases by that to live the life of a good Catholic and that if he cohabits thereafter with his wife, he is living in an open state of adultery within the meaning of the by-laws of defendant society, but that if he separates from such wife and no longer lives with her, he is not living in an open state of adultery within the meaning of said paragraph. It will be noted that the by-laws which

provide for expelling the member of the society therefrom because of the contract of a civil marriage were adopted after the certificate of insurance in this case was issued to the insured, and after Joseph Fleeha had contracted the civil marriage. As suggested, it was stipulated that at the time of the civil marriage and at the time the certificate was issued, the following rule and regulation as a part of the Canon law of the Roman Catholic Church: "That a member of the Roman Catholic Church is not excommunicated from the church by reason of entering into a marriage performed by a civil magistrate."

The testimony adduced by defendant is to the effect that even though a marriage is not recognized by the church, if parties separate as they did in this case, there is no longer a violation of the Canon law of the Church.

From the record it appears that the insured paid all of his dues up to the time of his death. From the facts adduced, including the testimony of defendant's witness, the plaintiff had the right to recover. The judgment is affirmed.

AFFIRMED.

WILSON AND NEBEL, JJ. CONCUR.

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36335

SLATCHFORD BUILDING CORPORATION, of
Chicago, Illinois,

(Plaintiff) Appellee,

v.

M. T. WOOD,

(Defendant) Appellant.

APPEAL FROM

SUPERIOR COURT

273 I.A. 610²

COOK COUNTY.

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment of the Superior Court of Cook County against defendant entered in a suit by plaintiff to recover moneys collected by defendant as agent of plaintiff, and claimed by defendant as commissions due him.

The declaration alleges that defendant on November 6th, 1924, became the general manager of the building known as the Slatchford Building, owned and operated by plaintiff, with a salary amounting to 4% of the collections made by defendant, as provided by a resolution of the Board of Directors of plaintiff corporation; that by consent of the parties, defendant's services were discontinued about April 1st, 1932, and that defendant at such time ceased making collections and turned over all leases to another manager, rendered a report of his collections, but retained, and asserted his right to retain, the amount sued for as "commissions for leases and renewals."

In his affidavit of merits, defendant insists that his employment under the terms of the resolution of the Board of Directors of the plaintiff corporation fixing his compensation at 4% of the sums collected, terminated about April 27th, 1931, instead of on April 1st, 1932, as alleged; that he was thereafter retained in such employment without any definite contract as to compensation, and that as a licensed real estate broker, and a member of the Chicago Real Estate Board, he is entitled to recover the customary amount usually paid for such services in this community. It is not disputed that

during this latter period, defendant was to have as his compensation and that he retained the 4% of collections made by him, agreed to be paid under the terms of his former contract, and the only question to be determined is whether or not he is governed by the contract, or is entitled to retain the additional sum of \$1,858.03, the amount of the judgment as the customary charge for the services rendered.

In Ingralls v. Allan, 133 Ill. 170, our Supreme Court said:

"The rule undoubtedly is, that if one person employ another at an agreed price for a time certain, and the employment is continued after the expiration of the time agreed upon without any new agreement as to price, the presumption is that the parties understood that the original rate of compensation is also to be continued; and it can make no difference that there may be some change in the services required and performed, so, that there be an increase or diminution of the labor, so long as it is clearly within the scope of the original employment. The reason is, that if the employee remains in the same employment, after his term of service has expired, without making demand for increased pay, the employer may well presume that no increased compensation is expected or will be required, and having acted upon that presumption, and failed to protect himself by a new contract, the employee will be held to have assented to a performance of the service at the original price. The rights of the employee and employer are mutual and reciprocal. So where the employer permits a continuation of the service after the term has expired, without a new stipulation as to the price, it will be presumed that he expected and intended to pay for the service of the original compensation stipulated. In such case, the recovery will not be upon the quantum meruit, but upon the contract implied by law, and for the compensation presumed to have been fixed by the parties. Hallace v. Floyd, 5 Casey, 184; Sanck v. Albright, 38 Pa. St. 387; M. H. Iron Factory v. Richardson, 5 N. H. 396; Grover & Baker S. M. Co. v. Bulkley, 48 Ill. 189."

Under the holding in this case, which we are of the opinion is the general rule, we hold that the plaintiff is entitled to recover the amount of its claim. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON AND NEBEL, JJ. CONCUR.

It is noted that the above information was obtained from the records of the Department of the Interior, Bureau of Land Management, and is being furnished to you for your information.

[illegible]

On account of the fact that the Government is not in a position to pay the interest on the bonds, the Government is not in a position to pay the interest on the bonds.

36342

CHICAGO CITY BANK & TRUST CO., as Conservator,
etc.,

(Complainant) Appellee,

v.

WILLIAM KAUFMAN, et al.,

Defendants

Appeal of SARAH HOFFMAN,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

273 1.A. 610³

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County entered in a suit brought to foreclose a mortgage trust deed, and ordering the sale of the property pledged to secure the payment of a note for \$15,000.00. The proceeding was instituted by complainant as conservator for one Ross Bush, insane. It is admitted that there had been a default in the terms of the mortgage deed. Defendant herein insists the decree should be reversed, because the conservator was not authorized by the Probate Court to institute the proceeding; that in taxing the costs and charges of the suit, the court's allowance for stenographer's fees was excessive, and that in allowing the cost of "foreclosure minutes," the court exceeded its powers.

The statute (Cahill's Ill. Rev. Stat. 1931, Ch. 23, Sec. 5) as construed in Burton v. Estate of McKeever, 202 Ill. App. 606, determines the question as to the right of complainant to sue in the affirmative. The statute provides:

"Suits in chancery may be commenced and prosecuted by infants, either by guardian or next friend, and by conservators on behalf of the persons they represent."

In construing this statute, the court in the case referred to, said:

"It is true that the conservator is under the general guidance and supervision of the Probate Court, which should hold him to the strictest accountability in the execution of his trust, and should carefully scrutinize his accounts in regard to the liabilities incurred or expenditures made. But the authority to bring a suit in chancery to protect his ward's interests is given by the statute and, in so doing, he is acting under the statute."

It is noted that the investigation is being conducted by the Bureau of the Federal Bureau of Investigation, and that the results of the investigation will be reported to the Bureau of the Federal Bureau of Investigation.

No order of the Probate Court was necessary to authorize the filing of the bill herein.

Defendants insist that the stenographer's charges ordered paid by the decree are excessive. As a basis for such contention, he urges certain alleged facts as to the amount of work done by the stenographer, which do not appear in the abstract, there fore, as to this point, there is nothing for the court to pass upon.

The abstract is a pleading of the parties in a court of review, and whatever is sought to be reviewed must be contained therein. McGovern v. City of Chicago, 302 Ill. App. 139, affirmed 331 Ill. 264.

A party who brings a cause to the Appellate Court must furnish a complete abstract or abridgement of the record, and must show everything in the abstract on which error is assigned. Grabill v. Ren, 110 Ill. App. 287.

As to the question of an allowance for "foreclosure minutes", to which defendant takes exception, the following appears in the abstract of the master's report, wherein the amounts found to be due are stated: "including \$117.28 for minutes of foreclosure." There is nothing in the abstract to indicate what this item includes, or why its allowance is deemed excessive.

The decree is affirmed.

AFFIRMED.

WILSON AND KENNEL, JJ. CONCUR.

36351

ALICE GWALDA,

Appellee,

v.

FEDERAL LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 610⁴

Opinion filed Dec. 13, 1933

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago in a suit on a policy of insurance. Trial was had before the court, resulting in a finding for plaintiff in the sum of \$1,000.00, and judgment was entered on the finding.

The affidavit of claim alleges that defendant is indebted to plaintiff in the sum of \$1,000.00 by the terms of a policy of insurance issued on the life of James Gwalda; that the policy provided that defendant would pay for the loss of the life of James Gwalda if his death occurred "by the burning of a building in which the assured shall be at the beginning of the fire", and alleges that while the policy was in force and by reason of fire and carbon monoxide poisoning, commonly known as gas poisoning, directly resulting from the burning of a building in which the assured was at the time of the fire, the assured thereby met his death.

The affidavit of merits filed by defendant, as abstracted is as follows:

"Affidavit of merits alleges that insured sustained a loss of life by asphyxiation due to strangling fumes and smoke while employed as a tunnel laborer within intercepting sewer tunnel of the Sanitary District, which said tunnel was under construction thirty-five feet below the surface of the ground at 22nd street and Laflin street, Chicago, Illinois. Said Sanitary District tunnel, also variously designated as a tunnel bore, extended approximately 325 feet along 22nd street on either side of Laflin street for a total length of 450 feet; that said tunnel was under construction for the sole purpose of transporting sewage."

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The policy of insurance was introduced in evidence, but nothing appears in the abstract to indicate its terms, except the following statement by counsel for the respective parties:

"Opening statement by plaintiff's counsel in which he states: 'I think that the only issue here of law and fact is the question of whether or not he met his death from injury sustained by the burning of the building in which the insured shall be at the beginning of the fire, as provided for in the policy, which is one of the conditions of liability, one of the classifications.'"

"Statement that as a matter of fact the only issue that is raised is that contained in Paragraph 4 of the defendant's affidavit of merits, which says: 'If insured under the policy sustained the loss of life by asphyxiation, due to strangling fumes and smoke, etc.' The said tunnel was under construction thirty-five feet below the surface at 32nd and Laflin streets, Chicago, Illinois. I presume the point they make here is that the so-called tunnel was not a building at the time. Am I right, counsel, in my statement to the Court that there is no other issue involved? Mr. Leeming: (Attorney for defendant) 'Yes, that is right.'"

The abstract is a pleading of the parties in a court of review, and whatever is sought to be reviewed must be contained therein. McGovern v. City of Chicago, 303 Ill. App. 139, affirmed, 281 Ill. 264.

The party who brings a cause to the Appellate Court must furnish a complete abstract or abridgement of the record, and must show everything in the abstract on which error is assigned. Grabill v. Esen, 110 Ill. App. 587.

Defendant argues at length that plaintiff cannot recover for the reason that under the terms of the policy sued on, the place where defendant lost his life was not a part of a building in which the assured was at the beginning of the fire. The facts are not in dispute, and are to the effect that the assured, with others, was engaged in the work of constructing a tunnel for the Sanitary District of Chicago. At the surface of the ground there had been erected a structure 1½ stories in height, with toilets, etc. From this structure a shaft 16 feet square extended straight down in the ground about 35 feet, built for the purpose of affording ingress and egress to and from the tunnel under construction by means of elevators and ladders. Branching off

The policy of Government in this respect is to maintain the status quo, and to avoid any change in the position of the Government in this respect.

The Government is not in a position to make any change in the position of the Government in this respect, and it is not in a position to make any change in the position of the Government in this respect.

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from the lower end of the shaft was, what is termed, a drift tunnel, which ran about 64 feet and connected with the main tunnel. It was in this main tunnel that the fire occurred, which caused the assured's death. All of these underground tunnels had cars running in them, and were equipped with pipes and wires for furnishing air and light. From the evidence, it appears that as the excavation for the tunnel was made, a supporting structure of heavy wooden beams and planks had been built. At the time of the fire, the assured was working in the main tunnel at a point about 125 to 130 feet from the lower end of the perpendicular shaft.

Walter H. Faget, a civil engineer employed by the Sanitary District of Chicago in the construction of the tunnel, testified as to the fire and smoke in the tunnel, which, it seems to be admitted, caused the death of the assured. As shown by the abstract, this witness stated that "the fire started in the east heading; that is, the one designated on the right of the plan. In the tunnel. I was not on the job when the fire started, and when I got there smoke was coming out of the shaft. That is, the shaft in the head house. The smoke was coming out in a large volume. I descended into the tunnel. I went down in the elevator in the drift tunnel and locked myself into the east head and found all the firemen were fighting what they thought was the fire, in this so-called mud ring. At that time the main tunnel and the drift tunnel was full of dense smoke. The east end of the lock was sixty-nine feet from the center line of the drift tunnel. I knew the deceased. He was working in the east heading during the fire. *** I first saw deceased when he was brought up between the hours of 10 P.M. and 1 A.M. He was brought from the shaft, from the top of the shaft, and was taken into this office shown on the other plan."

At the time of the fire, the temporary wooden supporting structure, consisting of heavy beams and planks together with the

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perpendicular shaft which was made of heavy beams and planks, and the building at the top of the shaft, constituted one continuous building. As already stated, from what is contained in the abstract, we are unable to tell just what the terms of the policy were. The trial court had the policy before him, heard the witnesses and on the case presented by defendant, we feel that we are not justified in interfering with the finding and judgment. Judgment is affirmed.

AFFIRMED.

WILSON, J. and HENDEL, J. CONCUR.

THE PEOPLE OF THE STATE OF ILLINOIS

Defendant in Error,

v.

JOHN E. NORTUP,

Plaintiff in Error.

WRIT OF ERROR TO

CRIMINAL COURT

COOK COUNTY.

273 I.A. 610

Opinion filed Dec. 13, 1933
MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This proceeding is here upon a writ of error issued to review the record, wherein it appears that an order was entered in the Criminal Court of Cook County finding the plaintiff in error guilty of a criminal contempt and committing him to the county jail of Cook County for a period of five days for said contempt.

From the order it appears that there was pending in the Criminal Court of Cook County, Illinois, an indictment entitled, "The People of the State of Illinois versus Timothy L. Connolly and others;" that said above entitled cause was on the 9th day of January, A. D. 1932, and had been for some weeks prior thereto, on trial before the Honorable Harry M. Fisher, a judge of the Criminal Court of Cook County, sitting with Judges James J. Kelly and John Prystalski as advisers, who were also judges of the Criminal Court; that said above cause was pending to and including January 14, 1932, that prior to the 9th day of January, 1932, Timothy L. Connolly, a defendant, had not been taken into custody upon said indictment, but for a considerable period of time had been a fugitive from justice.

That on the 9th day of January, 1932, a petition for habeas corpus, signed by John E. Letter, was filed in the Criminal Court of Cook County, in which petition it was alleged, among other things, that said Timothy L. Connolly was held in custody by John A. Swanson, State's Attorney of Cook County, and unnamed assistants of said John A. Swanson; that said Connolly was illegally held in the custody of the State's Attorney and his assistants.

That said petition for habeas corpus was on the 9th day of January, 1932, presented to the Honorable Philip L. Sullivan, one of the judges and acting as Chief Justice of the Criminal Court of Cook County, and that said Judge Philip L. Sullivan, as one of the judges of said court, ordered that the writ of habeas corpus prayed for, issue, returnable forthwith; that said habeas corpus proceeding was on for hearing before the said court on January 11, 12 and 14, 1932, and upon these various hearings incidents occurred in open court, which will be hereinafter designated as "First Incident," "second Incident," etc.

First Incident - January 11, 1932:

"Mr. Latter: Mr. Northup, take the stand, please. Mr. Northup then said: 'Before I take the stand I want to say that this petition is demurrable. It should be demurred. This action is wholly premature; your Honor has no more jurisdiction than the man in the moon, in this case.'

Whereupon the court said, 'Proceed. Swear the witness.' When Mr. Northup made the foregoing statement, he spoke in a loud, angry tone. His arm was extended directly toward the court, with his fist clenched, and on completing the statement turned his back upon the court and started to walk away from the bar."

Second Incident - at the same hearing on January 11, 1932.

"The Court (addressing Mr. Swanson): Do you know where Mr. Keele is?

Mr. Northup: May I point this out, in addition to what Mr. Swanson has said: The state's attorney's office had nothing to do with the apprehension of this man, as I testified. It was the Citizens' Association, acting entirely independently of us, who picked the man up in California, and amenable to their wishes he was made messenger. We are practically strangers to the proceeding. He could not be anything else. Their messenger has not been produced here, as far as anybody knows, and has not been in this country. What is there for the court to act upon? What is there to do except to dismiss this matter?

Mr. Latter: Just one thing before it is dismissed; I might suggest that Mr. Northup enlighten us whether he knows where Mr. Keele is, and whether he can reach him, and if he can, he should produce him.

Thereupon Mr. Northup, in loud tones and manner, indicating he was angry, said, 'I don't have to do anything of the kind.'

Thereupon the court said, 'Well' -

Thereupon Mr. Northup, in loud tone and in an angry manner, said: 'I don't have to go out and ascertain and find out where he is now.'

Thereupon the court said: 'Well, do I understand' - thereupon he was interrupted by Mr. Northup, who, in very loud tones and in an angry manner, with his arms extended and with his fist closed and raised, said: 'There is no power on earth that can compel me, in court or out of court.'

Thereupon the following took place:

The Court: Let me ask you a question, Mr. Northup. You can answer it or not, as you wish. Do you know where Mr. Keele is?

Mr. Northup: I do not. I tell you the absolute truth.

The Court: Well, I assume you are telling the truth. Do you expect him in your office today?

Mr. Northup: I doubt it.

Thereupon the court said: 'If he gets in touch with you, or you get in touch with him, will you ask him to come in here tomorrow morning?'

To which Mr. Northup replied, in very loud tones and in an angry manner: 'I will not, he doesn't belong here, he shouldn't be here.'

Thereupon the court said: 'I will continue this until tomorrow morning, give you time to make an effort to find him.'

To which Mr. Northup in a loud tone of voice and in an angry manner said: 'Who is going to make the effort to find him?'

Third Incident - January 12, 1932:

"The Court (continuing): In view of the fact -

"Thereupon Mr. Northup, in loud tones said: 'I am trying to get it (meaning this case) out of the way. I am tied up down stairs and held up and around.'

Whereupon the following occurred:

Mr. Letter: I would like to ask Mr. Muir a question, if the court please.

Mr. Northup: Such questions as he asked Mr. Singleton about a thousand and one things, attempting to interfere with the State's Attorney's office in doing its proper duty.

Mr. Letter: I am trying to find out if the State's attorney's office has -

Mr. Northup: I don't know how you are concerned with it, but we have been listening to it for 15 minutes.

The foregoing statement by Mr. Northup was made in loud and angry tones.

Thereupon the court said: 'Of course, I am presiding here.'

Mr. Northup: 'I know you are, but my time is valuable.'

The Court: 'I understand that; don't be concerned about that.'

Mr. Northup: 'I am not.'

Fourth Incident - January 14, 1932:

"While Mr. Harold Keele was examined by Mr. Bachrach, the following occurred:

Q. Did you talk with Mr. Northup before you left? A. Yes, sir.

Q. Did you tell him where you were going? A. I told him where I was going, which was to a spot different from the spot to which I went. Purposely misrepresented to Mr. Northup where I was going.

Q. For what purpose?

Mr. Taylor: That is objected to, as being immaterial, if the court please.

The Court: Objection overruled.

1. What is the purpose of the study?
The purpose of the study is to determine the effect of the new teaching method on the students' learning outcomes.

"To which," he replied, "in very loud tones and in
 an angry manner, 'I tell you, I don't want to see
 you any more!'"

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. The Commission is therefore unable to determine whether the CLPE is a legitimate organization or a subversive one.

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1. The first part of the document is a letter from the President of the United States to the Congress, dated January 3, 1863. It is a very important document, as it contains the President's views on the war and the future of the country. The letter is written in a very formal and dignified style, and it is one of the most important documents in the history of the United States.

North Island - January 11, 1961

1. The court should not be asked to consider the possibility of a writ of habeas corpus in this case.

A. I told Mr. Northup that I was going to Joliet, or rather I told him where I was going to leave the train at Joliet, when I intended or had it arranged so that I might leave the train at Streator or Joliet, optionally, in my judgment.

Mr. Bachrach: What was the reason for deceiving Mr. Northup?

Mr. Taylor: That is objected to.

The Court: Objection overruled.

Whereupon Mr. Northup, in loud and angry tones, said: 'I have no objection to going into it to the fullest extent.'

Whereupon the court said 'I intend to.'

Whereupon Mr. Northup, in loud and angry tones said: 'I am ready to accept any consequences in this kind of a proceeding.'

Whereupon the court said:

'That is your privilege,' and Mr. Northup replied, 'Certainly.' "

Fifth Incident - January 14, 1933:

"After the testimony had all been completed, the following proceedings took place:

The Court: I am going to have the record written up in this case, gentlemen. I will take it under advisement. I will let you know.

Mr. Northup: I want to know just what this proceeding is.

The Court: You have been here all this time, Mr. Northup.

Mr. Northup: Is this a proposed contempt proceeding, or is it something else?

The Court: You have been here all the time, You know.

Mr. Northup: Can't your Honor tell me whether it is a contempt proceedings or something else? We are in court, but I don't know what we are here for.

The Court: You don't!

Mr. Northup: No, sir, I don't know what we are here for. Isn't your Honor willing to tell me? (At same time turning toward the spectators as if to expect applause.)

The Court: You have been here. That is sarcasm. Mr. Northup.

Mr. Northup: I have been here all day hearing these proceedings. There has been no paper filed, no nothing. We are not here on any sort of process or document that I know anything about, and I would like to know why we are here, sir.

The Court: Well, you came in here yourself on the return of the writ, traverse to the writ, and you know it. Now, the question has been -

Thereupon, Mr. Northup, interrupted by saying in a loud tone: 'Let me know.'

Thereupon the court (continuing) said: 'from the time that the return was filed, as to whether or not the State's Attorney made a correct and true return in this case.'

Whereupon Mr. Northup, in a loud and angry tone, with his fists closed and raised and directed to the court said:

'Do you mean to imply, sir, that' -

Thereupon the court said: 'Wait a minute, wait a minute. I don't care for that, Mr. Northup. Now, let me suggest to you that I demand respect in my court room. I don't care for your dogmatic expressions, for your sarcastic remarks at all. They

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neither impress me, and I am sure that they do not coerce or intimidate me.'

Thereupon Mr. Northup said: 'I don't care that (snapping his fingers and directing same toward the face of the presiding judge) for it either.'

Whereupon the court said: 'That might be true, but you are amenable to the power that this court has, and this court is going to exercise it. I say to you now that this court is going to take this case under advisement, and will notify you what the judgment of the court is, as well as the other counsel here.'

Mr. Northup: Does that mean that your honor is going to find out, or undertake to ascertain, whether there has been a false return? Do I understand that from your remarks, a false return to the writ?

The Court: I have explained my position in the matter, and that is all there will be to it."

One of the grounds urged for reversal is that the language of the respondent while possibly somewhat vigorous was not really contemptuous, and that there was nothing pending before the court at the time of commitment. The habeas corpus proceeding was in fact pending and the respondent was in court representing the State's Attorney before the Honorable Philip L. Sullivan, a judge presiding, in response to a hearing had in this proceeding, and from the incidents fully appearing in the order, the court found that the respondent was insulting in a defiant and belligerent manner, and that his conduct was contemptuous toward the court. The attitude of the respondent and his manner and conduct, such as the clenching of his fists, the snapping of his fingers at the court, and the turning of his back to the court in argument, were described in the order, and this court can only consider these facts as they appear in the order. The appearance on these occasions can best be described by the trial court in the order, and this court is not in a position to fairly determine that the respondent's conduct was not as described in the order.

We cannot agree with the respondent that he was not disrespectful in his attitude, nor in the use of vigorous language toward the court.

[illegible][illegible]

dispositional in his attitude, but in the use of vigorous language toward the court.

One serious defect in the order of commitment is that it does not show that the respondent was in court at the time of the entry of the order. It is the rule that when an order in a contempt proceeding is entered it must appear in the commitment order that the respondent was present in person, and from the order it must appear that at the time the order was entered the court had jurisdiction of the person. This does not appear in the order in the instant case.

It is admitted by the State in this proceeding that while from the order it does not appear that the respondent was physically present in court when the order was entered, it does appear in the common law record that the respondent moved for a new trial and in arrest of judgment, and that the commitment order be stayed. While it is true that such motions appear in the common law record, there is the uncertainty of the time when such motions were made by the respondent, at the time the order was entered or afterward. It has been held to be the rule by the courts of Appellate jurisdiction in this state that such motions must be preserved by a bill of exceptions, and that the entry of such motions in the common law record will not answer the purpose. Benson v. Benson, 35 Ill. App. 505; The People v. Baylor, 238 Ill. App. 14; Graham v. The People, 115 Ill. 566; Morris v. The People, 301 Ill. 402; People v. Jennings, 352 Ill. 4534; Greenwell v. Hess, 390 Ill. 459. The fact still remains that the order is silent upon the question of the respondent's being in court in person.

In support of the rule that the order must show that the respondent was in court when the order of punishment was entered, this court in the case of Benson v. Benson, supra, said:

"In this order no service on the plaintiff in error is shown, and it does not appear that she was present in court when she was adjudged guilty of the contempt. A court may commit for contempt in its presence, without the service of any process on the defendant, but in such case the order of commitment should show that the defendant was present in court when the judgment was entered, else there is no way of ascertaining whether the court had jurisdiction of the person."

This rule was again approved in the case of The People v. Taylor, supra, where in referring to an order of commitment, these words are used:

"It also fails to show whether or not the plaintiffs in error were present in court at the time the order was entered. The alleged contempt against the court was in its nature criminal, and the order should show the presence in court of the plaintiffs in error when the penalty was imposed."

And again, in a later decision entered in the case of Tunnell v. People, ex rel. Miller, 253 Ill. App. 422, the court said:

"The order entered also fails to show whether or not plaintiff in error was present in the court at the time the order was entered. The alleged contempt against the court was in its nature criminal, and the order should show the presence in court of the plaintiff in error when the penalty was imposed."

It may be that the respondent's point is purely legalistic as suggested by the state and that the cases in support of the respondent's position are largely the opinions of the ^{Appellate} court, still the decisions of this court are sustained by authorities based upon the law and are advisory, if not controlling. It is not for this court to establish a new rule not justified by authority or reason.

Other questions have been called to our attention, but in view of the conclusion we have reached, as indicated in this opinion, it will not be necessary to dispose of these questions. The order entered in this case will therefore be reversed.

ORDER REVERSED.

HALL, P.J. AND WILSON, J. CONCUR.

This rule was again suggested in the case of THE UNITED STATES.
There is nothing to be done in consequence, which means the same.
It also falls to show whether or not the principle is correct
with respect to cases of the kind now before the court. The
assumed contrary result is that the law is not binding,
and the court should give the judgment in favor of the
state in every such case.

And again, in a recent decision rendered in the case of UNITED STATES.
UNITED STATES, 111. 111. 111. 111. 111. 111. 111. 111. 111. 111.

The writer cannot find it in his heart to say that
this is true and correct in the case of the law of the state
as stated. The writer knows that the law is
the nature of the state, and the writer knows the nature of
the law of the state in every such case.

It may be that the respondent's point is really legitimate
as suggested by the state and that the state is correct in this
Appellate
respondent's position the law is not binding. This
the decision of this court was sustained by a majority of four
the law and the minority, it is not binding. It is not for this
court to establish a new rule not justified by necessity or reason.
That position have been called for attention, but
in view of the decision in this case, it is not for this
reason, it will not be necessary to discuss the question. The
other matters in this case will be discussed in another
order.

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35401

H. ROY BERRY,

Defendant in Error,

v.

FRANCES MARY BERRY,

Plaintiff in Error.

DOCKETED

SUPERIOR COURT,

COOK COUNTY.

273 I.A. 611

Opinion filed Dec. 13, 1935
MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Superior Court of Cook County, whereby the defendant seeks to reverse a divorce decree entered in that court on June 9, 1931. The complainant filed a bill for divorce against the defendant, his wife, on the grounds of habitual drunkenness and extreme and repeated acts of cruelty. The defendant filed an answer denying the charges in the bill, also an amended cross-bill charging habitual drunkenness and extreme and repeated acts of cruelty on the part of the complainant.

Upon the issues the court heard the evidence and entered the decree, which in substance finds the equities in favor of the complainant, finds the defendant guilty of extreme and repeated cruelty and habitual drunkenness, and dismisses the defendant's amended cross-bill for want of equity. The decree also provides for the payment of \$250 each month by the complainant to the defendant as alimony, and directs the complainant to pay to the defendant the sum of \$4500 as and for her solicitors' fees.

The defendant contends that where, from a consideration of the whole record the evidence does not justify or support the decree, it is the duty of the court, upon review, to reverse the decree, which of course means that in order to reverse a judgment or decree entered by the court upon a hearing, the final judgment must be against the weight of the evidence.

In the consideration of this question the court has examined the evidence called to our attention by the briefs filed, and

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1990s. For example, the number of people who have been killed in the conflict in the Democratic Republic of the Congo has been estimated at 5 million (Human Rights Watch 2002).

The authors would like to thank the following people for their assistance:

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18. Be sure you understand and are up to speed on everything we discuss here.

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1. The following is a list of the names of the persons who have been appointed to the various positions in the organization of the American Society of International Law, for the year 1911-1912.

The above record for Wilson was not available to the FBI on 10/10/68.

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It is recommended that the following steps be followed:

And the evidence will be that the world is flat.

it is to be noted that there is a conflict in the evidence in the record. In the first instance it is for the chancellor to determine the weight of the evidence and what, if any, issues have been sustained by the proofs, and in the hearing of the evidence the court no doubt applied the law affecting the question of credibility of witnesses, and unless the decree of the court is against the manifest weight of the evidence, the decree must stand. In order to determine when a judgment or decree is against the manifest weight of the evidence it must appear from an examination of the evidence in the record that it is obvious and apparent that the final judgment is not sustained by the proof.

The complainant and the defendant were married July 7, 1927, and lived together until November 5, 1929, and at that time the complainant left the defendant and soon thereafter filed a bill of complaint upon the grounds charged.

There is no dispute that the parties in this case indulged in intoxicating liquor, and it is apparent that the question of drinking intoxicants was the occasion of several discussions between the complainant and the defendant, which finally culminated in the signing of a pledge by the defendant, as well as by the complainant, by which each promised to abstain from all alcoholic beverages for six months ending October 9, 1928.

There is a conflict in the evidence as to what occasioned the signing of this so-called pledge. A pledge, of course, is nothing but a promise, nevertheless in the instant case it was of evidential value as proof that the question of drink was the subject of dispute between the parties. There is evidence of the drinking of intoxicants and the effect upon the physical condition of the defendant. There is evidence that doctors were called to administer sedatives to the defendant on different occasions, and that she was advised that she should stop drinking on account of her health; that a nurse was also

called and remained with the defendant for several nights; that Dr. Shipley testified that when called to attend her he advised that her condition was due to the excessive use of alcohol, and treated her as an alcoholic. The complainant testified to numerous specific instances when his wife was in a staggering and incoherent condition, and appeared wild-eyed, and stated that on every such occasion, in his opinion, the defendant was intoxicated. The defendant denied specifically that she was intoxicated on the occasions testified to by the complainant. Numerous witnesses were heard, and from this evidence the court concluded that the complainant's charge of habitual drunkenness was sustained. In Borian v. Borian, 298 Ill. 24, in passing upon the question of when habitual intoxication is formed, the court said:

"The habit of intoxication is formed gradually. There is ordinarily no definite time when the habit may be said to have begun."

And then again, in passing upon the question of where a person charged with habitual drunkenness during the two-year period preceding the filing of the bill, abstained from drink for a period and therefore was not guilty of habitual drunkenness, the court said:

"The fact that for a portion of the time she was not intoxicated because she could not get any intoxicating liquor and that for short periods she voluntarily abstained does not indicate that she was not guilty of habitual drunkenness during the time. Intoxication without intermission is not necessary to habitual drunkenness, and the evidence is conclusive that the defendant's habit of intoxication was never reformed."

The facts in this record are sufficient to sustain the conclusion of the court that the defendant was guilty of habitual drunkenness for the statutory period. The defendant testified that she was instructed while she was a patient in the Mayo Brothers hospital, and, further by Dr. Shipley, her physician, as to the effect of the use of intoxicating liquor upon her physical condition.

The point is made by the defendant that the evidence does not clearly establish that the defendant was guilty of habitual

drunkenness for the statutory two-year period required by law; that at times she did not indulge in the use of liquor, and that it does not appear from the record that the proof was sufficient to sustain the charge of habitual drunkenness. That is a question for the court to determine from all the facts and circumstances in the case, and also the question of the defendant's habits in the use of intoxicants.

In the discussion of the evidence, the defendant comments upon the complainant's testimony as being in almost perfect order and sequence and given with the exactness and precision of an adding machine, and her own as being free from such telltale earmarks of impropriety. However, the credibility of witnesses is for the court, and no doubt the chancellor tested the complainant's credibility in determining the weight to be given the complainant's evidence.

The defendant complains that while one of the acts of cruelty charged in the bill of complaint is corroborated, still the other acts are dependent upon the testimony of the complainant alone, and therefore the repeated acts of cruelty charged in the bill are not sustained, especially where the defendant denied the charge.

The evidence of the complainant as to the occasion when he brought some ice-cream home is corroborated by Mrs. Edna M. Lauder milk, who testified that the defendant scratched the complainant on that occasion. This is one of the acts charged in the bill of complaint.

Another incident occurred when leaving the Bye party. The defendant struck the complainant while driving home in an automobile. The complainant stopped the automobile suddenly and as a result the defendant fell forward and hit her head on the instrument board of the car; thereupon she left the car, and when he arrived home he found that she had already arrived there, and at the time of his arrival the defendant struck and scratched him and he left the apartment and stayed at the Sherman Hotel, where he telephoned to Mrs. May

Schultz, Mrs. Berry's sister, to take care of her, that she was intoxicated. There seems to be no dispute that on this occasion an assault had been committed. The dispute is whether the complainant assaulted the defendant, or whether the defendant was the aggressor and assaulted the complainant without cause. Mrs. Schultz arrived at the apartment in response to the complainant's telephone call, and she testified as to the bruises she found on her sister's body upon arriving at the apartment.

Another assault took place when the complainant and the defendant were invited to a dinner at the Cornell's, which was witnessed by persons present and which is not disputed by the defendant.

It is not necessary that all the acts of cruelty occur in the presence of the witnesses, but the chancellor must find that the acts of cruelty were repeated, and in so finding the court was fully justified by the evidence in the record.

It is also contended by the defendant that if both parties to a suit for divorce are guilty of mutual wrongs, the doctrine of recrimination is applicable, and neither will be entitled to relief, and it is suggested in the defendant's brief that if the testimony of each of the parties is of equal credit and the complainant and the defendant charge each other with the same statutory offenses, the court will not disturb the marital relations.

The facts are to be considered, and we have examined the evidence and find that the complainant tried unsuccessfully to have his wife, the defendant, abstain from drinking alcoholic liquors. The doctors were called at the request of the complainant, who also advised the defendant to abstain from the use of intoxicants. The defendant, on the other hand, charges the complainant with the use of liquor and of inducing the defendant to drink. These charges do not appear to be justified by the record. The charge by the complainant of cruelty and habitual drunkenness is sustained and established by the evidence,

and is supported by the rule announced in the case of Teal v. Teal, 324 Ill. 207, wherein the court said:

"It has been said many times that it must be a clear case which will induce the court to grant a divorce on the application of the husband for the cruelty of the wife, but this does not mean that any different principles of law or rules of evidence apply in cases where the husband is complainant from cases where the wife is complainant."

The defendant contends that the complainant is guilty of connivance in bringing about the alleged condition of habitual drunkenness and the use of liquor by his wife, of which he now complains, and that he encouraged that habit solely for the purpose of securing a divorce. He finds nothing in the record from which it would appear that the complainant was guilty of wilfully and maliciously causing the condition of the defendant as contended by her.

The defendant also contends that the facts offered by her support the charges, which were of the same character as those made by the complainant, and therefore the court erred in not granting the relief prayed for in her cross-bill, and the court having failed to grant the relief prayed for, neither the complainant nor the defendant is entitled to relief. While her position is inconsistent upon this point, still the chancellor was fully warranted by the record in granting the complainant the relief prayed for in his bill of complaint.

We have examined the evidence upon the question of repeated acts of cruelty and habitual drunkenness charged in the cross-bill, and find that the evidence offered by the cross-complainant does not sustain her amended cross-bill.

The complainant in support of the cross-error assigned by him, suggests that the court erred in allowing the defendant \$50 each month as alimony, and a further allowance of \$4500 as and for the defendant's solicitors' fees.

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FILED - JANUARY 24 1968

[illegible]

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

6. The following is a list of the names of the persons who have been appointed to the various positions in the organization of the American Society of International Law, for the year 1910-1911.

[illegible]

1. The first of these is the fact that the system is not a simple one, but a complex one, involving many different factors, and the results are not always the same.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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1. *Staphylococcus aureus* (100%)

Received 22 September 2000; accepted 20 November 2000

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15. The following information was obtained from the records of the Department of the Interior, Bureau of Land Management, regarding the land owned by the United States in the State of Nevada:

THE UNIVERSITY OF CHICAGO PRESS

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REPORTED BY THE NATIONAL BUREAU OF INVESTIGATION

2025 RELEASE UNDER E.O. 14176

• 2014年10月1日起，凡在北京市行政区域内从事经营活动的法人和其他组织，均应当依法向税务部门申报纳税。

bioassays were performed in triplicate and the mean \pm standard deviation (SD) was calculated.

On 12/15/1994, the undersigned, a duly sworn State Trooper, advised that the above information was obtained from the following sources:

[illegible]

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The decree in this case is based upon evidence heard by the court that was offered in open court by the complainant and the defendant upon the financial status and earning ability of the complainant, and upon the financial needs and requirements of the defendant, and the court directed the payment to the defendant by the complainant of the amounts provided for in the decree.

This court is of the opinion that upon this question the trial court is sustained by the evidence in the record. The facts are, in part, that the defendant was in receipt of an allowance of about \$600 a month, from the complainant, also gifts of jewelry, and that the complainant's real estate business was a lucrative one. Therefore, we are unable to agree with the contention of complainant's counsel that the court entered an improper allowance.

The decree is affirmed.

DECREE AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

36425

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

PETER VREITOS,

Plaintiff in Error.

ERROR TO

CRIMINAL COURT

COOK COUNTY.

273 I.A. 611²

Opinion filed Dec. 13, 1933

MR. JUSTICE HENEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Criminal Court of Cook County, to review the record in a proceeding wherein the defendant was found guilty upon a hearing before the trial court without a jury.

The defendant was charged in the indictment with the offense of "driving a car without the owner's consent, and in the absence of the owner upon a public street or highway", and judgment was entered sentencing the defendant to six months imprisonment in the House of Correction and fining him \$1. for such offense.

The common law record is in this court, and upon the record the defendant contends that the Supreme Court of Illinois in the case of The People v. Clark, 301 Ill. 428, held that Section 39 of the Illinois Motor Vehicle Act was unconstitutional, on the ground that the penalty for stealing an automobile is not ^{within} the general purpose of the title of the act; that the opinion of the Supreme Court for the same reason, invalidates other sections of the Motor Vehicle Act charging a crime.

The defendant also contends that the finding of the court that the defendant is guilty of driving without the owner's consent, merely adjudges the defendant guilty of a part of the offense charged in the fourth count of the indictment, and is insufficient upon which to predicate a valid judgment.

The answer of the People of the State of Illinois to the defendant's contention that the section in question is unconstitutional, is that the defendant thereby raises a question that can only be heard by the Supreme Court of the State of Illinois. This is true when such is the purpose of the appeal and the act is directly attacked as being in violation of the terms of the Constitution of the State of Illinois, but the defendant in the instant case contends that the decision of the court in The People v. Clark, supra, invalidates all sections of the Motor Vehicle Act charging a crime.

From an examination of the opinion of the Supreme Court in The People v. Clark, supra, it appears that the court determined that the legislature has authority to fix a different punishment for the stealing of an automobile from that provided for larceny in general, and the court held that in order to do so the legislature must make the change by a proper amendment to the Criminal Code, and the court further held that the act in question cannot be sustained as an amendment to the Criminal Code, for the reason that the act does not purport to be an amendment, and the crime charged is not within the general purpose of the title of the act. The fact that the Illinois Legislature passed an act covering the larceny of an automobile and added the section to the larceny section of the Criminal Code, but failed to add an act to the Criminal Code making it an offense for a person to drive an automobile without the owner's consent has no bearing in the instant case. People v. Clark, supra, is not applicable. It is clear that Section 30 of the Motor Vehicle Act fixes a penalty for a crime that is only covered by this section of the act, as charged in the allegations of the indictment.

In the case of People v. Farnow, 288 Ill. 637, the court held that Section 15b of the Motor Vehicle Act, as amended, making it a criminal offense to have possession of any motor vehicle from which the manufacturers' number had been removed, valid. This case is of

material aid in disposing of the defendant's contention that the act in question is not valid. The court in The People v. Farnor said:

"It is alleged that the section has more than one object and the object is not clearly indicated in the title of the act. The object is single, and although the title says nothing about the particular matter of having possession of a motor vehicle upon which the serial number has been changed, it comes within the general purpose of the act. The act has a general title and an aggregation of particulars which tend rather to confusion than certainty, but it includes the registration of motor vehicles upon an application setting forth the name of the maker and the factory and the engine number, and the section in question is within the general purpose of the act as expressed in the title."

There remains to be considered the question, was the trial court's finding insufficient upon which to predicate a valid judgment. The defendant cites as authority the case of The People v. Blue, 222 Ill. App. 265. The Appellate Court found the information defective in that it did not name the owner of the vehicle, nor allege that it was driven or operated upon a "street or highway of this State", or "in the absence of the owner." This case is not applicable to the indictment, which charges in the fourth count that the defendant, on June 7, 1932, "did unlawfully and wilfully drive and operate a motor vehicle, to wit: an automobile upon a street and highway in said County of Cook and State of Illinois, in the absence of one Horace Lindheimer owner of said motor vehicle, without the consent of said Horace Lindheimer, owner of said motor vehicle, contrary, etc."

The finding of the trial court is, in part, as follows:

"And the court being fully advised in the premises, doth find the said defendant guilty of driving a car without the owner's consent in manner and form as charged therein."

^{of}
The finding/the court is general and is sufficient to support the judgment entered by the court. It is not necessary that the finding specifically describe the offense charged in the indictment. Such

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THESE RESULTS ARE IN ACCORD WITH THE FINDINGS OF OTHER STUDIES THAT HAVE SHOWN THAT THE USE OF A SINGLE-STEP PROCESS IS MORE EFFECTIVE THAN A TWO-STEP PROCESS IN IMPROVING STUDENT PERFORMANCE.

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2. The user is not allowed to use the system if the system is not in a state of readiness.

Received of the Secretary of the Treasury, the sum of \$100.00 on the 17th day of July 1901

1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-2638-2639-2640-2641-2642-2643-2644-2645-2646-2647-2648-2649-2650-2651-2652-2653-2654-2655-2656-2657-2658-2659-2660-2661-2662-2663-2664-2665-2666-2667-2668-2669-2670-2671-2672-2673-2674-2675-2676-2677-2678-2679-2680-2681-2682-2683-2684-2685-2686-2687-2688-2689-2690-2691-2692-2693-2694-2695-2696-2697-2698-2699-2700-2701-2702-2703-2704-2705-2706-2707-2708-2709-2710-2711-2712-2713-2714-2715-2716-2717-2718-2719-2720-2721-2722-2723-2724-2725-2726-2727-2728-2729-2730-2731-2732-2733-2734-2735-2736-2737-2738-2739-2740-2741-2742-2743-2744-2745-2746-2747-2748-2749-2750-2751-2752-2753-2754-2755-2756-2757-2758-2759-2760-2761-2762-2763-2764-2765-2766-2767-2768-2769-2770-2771-2772-2773-2774-2775-2776-2777-2778-2779-2780-2781-2782-2783-2784-2785-2786-2787-2788-2789-2790-2791-2792-2793-2794-2795-2796-2797-2798-2799-2800-2801-2802-2803-2804-2805-2806-2807-2808-2809-2810-2811-2812-2813-2814-2815

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Содержание: 1. Введение. 2. Описание системы. 3. Требования к системе. 4. Проектирование системы. 5. Реализация системы. 6. Тестирование системы. 7. Заключение.

State of Washington, King County, ss. I, the undersigned, a duly qualified and authorized officer of said County, do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of said County.

THE UNIVERSITY OF CHICAGO

1998-1999, 2000-2001, 2001-2002, 2002-2003, 2003-2004, 2004-2005, 2005-2006, 2006-2007, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017, 2017-2018, 2018-2019, 2019-2020, 2020-2021, 2021-2022, 2022-2023, 2023-2024, 2024-2025, 2025-2026, 2026-2027, 2027-2028, 2028-2029, 2029-2030, 2030-2031, 2031-2032, 2032-2033, 2033-2034, 2034-2035, 2035-2036, 2036-2037, 2037-2038, 2038-2039, 2039-2040, 2040-2041, 2041-2042, 2042-2043, 2043-2044, 2044-2045, 2045-2046, 2046-2047, 2047-2048, 2048-2049, 2049-2050, 2050-2051, 2051-2052, 2052-2053, 2053-2054, 2054-2055, 2055-2056, 2056-2057, 2057-2058, 2058-2059, 2059-2060, 2060-2061, 2061-2062, 2062-2063, 2063-2064, 2064-2065, 2065-2066, 2066-2067, 2067-2068, 2068-2069, 2069-2070, 2070-2071, 2071-2072, 2072-2073, 2073-2074, 2074-2075, 2075-2076, 2076-2077, 2077-2078, 2078-2079, 2079-2080, 2080-2081, 2081-2082, 2082-2083, 2083-2084, 2084-2085, 2085-2086, 2086-2087, 2087-2088, 2088-2089, 2089-2090, 2090-2091, 2091-2092, 2092-2093, 2093-2094, 2094-2095, 2095-2096, 2096-2097, 2097-2098, 2098-2099, 2099-2100, 2100-2101, 2101-2102, 2102-2103, 2103-2104, 2104-2105, 2105-2106, 2106-2107, 2107-2108, 2108-2109, 2109-2110, 2110-2111, 2111-2112, 2112-2113, 2113-2114, 2114-2115, 2115-2116, 2116-2117, 2117-2118, 2118-2119, 2119-2120, 2120-2121, 2121-2122, 2122-2123, 2123-2124, 2124-2125, 2125-2126, 2126-2127, 2127-2128, 2128-2129, 2129-2130, 2130-2131, 2131-2132, 2132-2133, 2133-2134, 2134-2135, 2135-2136, 2136-2137, 2137-2138, 2138-2139, 2139-2140, 2140-2141, 2141-2142, 2142-2143, 2143-2144, 2144-2145, 2145-2146, 2146-2147, 2147-2148, 2148-2149, 2149-2150, 2150-2151, 2151-2152, 2152-2153, 2153-2154, 2154-2155, 2155-2156, 2156-2157, 2157-2158, 2158-2159, 2159-2160, 2160-2161, 2161-2162, 2162-2163, 2163-2164, 2164-2165, 2165-2166, 2166-2167, 2167-2168, 2168-2169, 2169-2170, 2170-2171, 2171-2172, 2172-2173, 2173-2174, 2174-2175, 2175-2176, 2176-2177, 2177-2178, 2178-2179, 2179-2180, 2180-2181, 2181-2182, 2182-2183, 2183-2184, 2184-2185, 2185-2186, 2186-2187, 2187-2188, 2188-2189, 2189-2190, 2190-2191, 2191-2192, 2192-2193, 2193-2194, 2194-2195, 2195-2196, 2196-2197, 2197-2198, 2198-2199, 2199-2200, 2200-2201, 2201-2202, 2202-2203, 2203-2204, 2204-2205, 2205-2206, 2206-2207, 2207-2208, 2208-2209, 2209-2210, 2210-2211, 2211-2212, 2212-2213, 2213-2214, 2214-2215, 2215-2216, 2216-2217, 2217-2218, 2218-2219, 2219-2220, 2220-2221, 2221-2222, 2222-2223, 2223-2224, 2224-2225, 2225-2226, 2226-2227, 2227-2228, 2228-2229, 2229-2230, 2230-2231, 2231-2232, 2232-2233, 2233-2234, 2234-2235, 2235-2236, 2236-2237, 2237-2238, 2238-2239, 2239-2240, 2240-2241, 2241-2242, 2242-2243, 2243-2244, 2244-2245, 2245-2246, 2246-2247, 2247-2248, 2248-2249, 2249-2250, 2250-2251, 2251-2252, 2252-2253, 2253-2254, 2254-2255, 2255-2256, 2256-2257, 2257-2258, 2258-2259, 2259-2260, 2260-2261, 2261-2262, 2262-2263, 2263-2264, 2264-2265, 2265-2266, 2266-2267, 2267-2268, 2268-2269, 2269-2270, 2270-2271, 2271-2272, 2272-2273, 2273-2274, 2274-2275, 2275-2276, 2276-2277, 2277-2278, 2278-2279, 2279-2280, 2280-2281, 2281-2282, 2282-2283, 2283-2284, 2284-2285, 2285-2286, 2286-2287, 2287-2288, 2288-2289, 2289-2290, 2290-2291, 2291-2292, 2292-2293, 2293-2294, 2294-2295, 2295-2296, 2296-2297, 2297-2298, 2298-2299, 2299-2300, 2300-2301, 2301-2302, 2302-2303, 2303-2304, 2304-2305, 2305-2306, 2306-2307, 2307-2308, 2308-2309, 2309-2310, 2310-2311, 2311-2312, 2312-2313, 2313-2314, 2314-2315, 2315-2316, 2316-2317, 2317-2318, 2318-2319, 2319-2320, 2320-2321, 2321-2322, 2322-2323, 2323-2324, 2324-2325, 2325-2326, 2326-2327, 2327-2328, 2328-2329, 2329-2330, 2330-2331, 2331-2332, 2332-2333, 2333-2334, 2334-2335, 2335-2336, 2336-2337, 2337-2338, 2338-2339, 2339-2340, 2340-2341, 2341-2342, 2342-2343, 2343-2344, 2344-2345, 2345-2346, 2346-2347, 2347-2348, 2348-2349, 2349-2350, 2350-2351, 2351-2352, 2352-2353, 2353-2354, 2354-2355, 2355-2356, 2356-2357, 2357-2358, 2358-2359, 2359-2360, 2360-2361, 2361-2362, 2362-2363, 2363-2364, 2364-2365, 2365-2366, 2366-2367, 2367-2368, 2368-2369, 2369-2370, 2370-2371, 23

Figure 1. The effect of the concentration of the inhibitor on the rate of polymerization of styrene in the presence of $\text{K}_2\text{S}_2\text{O}_8$ at 50°C. The concentration of $\text{K}_2\text{S}_2\text{O}_8$ was 0.001 mole/l. The concentration of the inhibitor was 0.0001 mole/l. The concentration of styrene was 0.01 mole/l.

[illegible]

*And the second point I'd like to mention is the importance of the role of the individual in the process of change. It is not enough to have a vision or a plan; it is essential that each person in the organization understands their role in the process and is committed to the goal. This requires a strong sense of ownership and responsibility, and a willingness to take action and make decisions. It is only when each person is fully engaged and committed that the organization can achieve its full potential.

U.S. DEPARTMENT OF AGRICULTURE

...and the

...and the ...

is not the law and it is our conclusion from an examination of the record that a finding of guilty is sufficient where the offense is described in general terms and includes by reference, in manner and form, as charged in the indictment. People v. Tierney, 350 Ill. 515.

For the reasons indicated in this opinion, we find no reversible error in the record, and the judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

is not the law but is an unwritten law of nature. It is the law of the universe, of which the human mind is a part. It is the law of the universe, of which the human mind is a part. It is the law of the universe, of which the human mind is a part.

111

For the reason indicated in this opinion, we find no reversible error in the record, and the judgment is accordingly affirmed.

RECORDED 111111

RECORDED 111111

36450

PERSONAL LOAN & SAVINGS BANK, a
Corporation,

Appellee,

v.

CLARA BERGER, THOMAS J. GRADY,
DOROTHY BUCKLEY and SAMUEL B.
BARNETT,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 611³

Opinion filed Dec. 13, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendants appealed from an order entered in the Municipal Court of Chicago on October 14, 1932, denying a motion of the defendants to vacate and open a judgment entered by confession for \$541.10, on October 10, 1932, and for leave to appear and defend, and for a stay of execution. The promissory note upon which this confession of judgment was entered, was dated February 18, 1932, and was signed by Clara Berger, Thomas J. Grady, Dorothy Buckley, Samuel B. Barnett and Dave Feller, wherein they jointly and severally promise to pay to the order of the plaintiff, fifty-two weeks after date, \$700, with interest at the rate of 7% per annum, after maturity; Savings Account No. 3 M279 in said plaintiff bank having been assigned and deposited with said bank as collateral security. The signers of the note, jointly and severally, promise to increase the amount of security for this obligation by depositing \$53 in said savings account on the 15th day of each month after date until paid, and if such deposits should not be made, or in the event of default in any of the terms of the note, then this obligation, at the option of the holder, shall immediately become due and payable, whether due according to its terms or not. The warrant of attorney is included in the promissory note, and provides, substantially, that any attorney may appear in any court and confess judgment against each and all of the makers of the note, without process, for the amount unpaid on

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1997-1998

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

110. A. I. 878

Opinion filed Dec. 13, 1973

The document was prepared by the following persons:

[Faint, illegible handwritten notes]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... ..

1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 84

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Received 14 April 2005; accepted 12 May 2005; first published online 12 July 2005

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

SECRET

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

to you at 12:00 to 1:00 PM. We will be at the 12:00 PM meeting.

and to advise the public of the results of the study.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

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said note, together with costs and attorney's fees. The amount due on said note and attorney's fees was entered as hereinabove stated.

A motion and affidavit was filed on October 14, 1932, by the defendants to open the judgment, and for leave to plead. From the affidavit it appears that the payment of installments falling due on the 15th day of July, August, September, October and November, 1932, were extended by the plaintiff until the 15th day of December, 1932, on consideration that said defendants would pay said installments so extended at the time agreed upon, and thereby the plaintiff waived any default in the payments for July, August, September, October and November, 1932; that by reason of such extension, none of said installments were due on October 10, 1932, the date said judgment by confession was entered on motion of the plaintiff; that on October 14, 1932, the court overruled the defendants' motion to vacate the judgment, and thereupon the defendants, except David Peller, appealed from the order entered October 14, 1932, denying the motion of the defendants.

No other evidence was heard by the court on said motion, except the affidavit of the defendants in support of the motion to vacate.

The question in this case is, did the extension of the payments, as above set forth, for the amount agreed upon by the defendants to be paid to the plaintiff, modify the written evidence of the indebtedness so that a judgment by confession could not be rightfully entered.

Upon an examination of the power of attorney included in the promissory note, it appears that the defendants jointly and severally authorized any attorney of any court, at any time after the date of the note, to appear for the attorneys jointly and severally, and confess judgment against each and all of the signers of the note, without process, and in favor of the holder of the promissory note,

for the amount unpaid, together with costs and reasonable attorney's fees.

It is the established rule in this state that the holder of a note, under the warrant of attorney, has the right to have a judgment entered at any time after the date of the note, when the note so provides, regardless of the time when the principal of the note became due.

The extension by the plaintiff of the installments does not in any way affect the right of the plaintiff to have a judgment entered on the note for the amount due. Bradshaw v. Hansen, 232 Ill. App. 44.

The affidavit of the defendants admits that a large part of the principal of the note remains unpaid. No equitable ground appears in the affidavit, and the only defense is that the unpaid installments were extended by the plaintiff.

The trial court did not err in denying defendants' motion to vacate and open the judgment, and for leave to plead. Therefore the order is affirmed.

ORDER AFFIRMED.

HALL, F.J. AND EILSON, J. CONCUR.

For the purpose of the present inquiry, it is not necessary to consider the

fact.

It is the intention of the present inquiry to consider the

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36469

PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

WALTER JAMES GREGOR,

Plaintiff in Error.

APPEAL TO

CRIMINAL COURT

COOK COUNTY.

23 I.A. 611⁴

Opinion filed Dec. 13, 1933

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant was indicted and tried upon a count alleging that on the 17th day of February, 1933, he did unlawfully carry concealed on or about his person a certain pistol, contrary to the statute. A jury was waived by the defendant, and the court found the defendant guilty of carrying concealed weapons in manner and form as charged in the indictment, and after motions for a new trial and in arrest of judgment were overruled, the court entered the following order and judgment:

"And the court hearing the testimony of witnesses, and being fully advised in the premises, doth find the defendant, Walter James Gregor, guilty of carrying concealed weapons in manner and form as charged in the indictment.

"Therefore it is considered, ordered and adjudged by the court that the said defendant, Walter James Gregor, is guilty of the said crime of carrying concealed weapons in manner and form as charged in the indictment, in this cause, on the said finding of guilty, and that he be and is hereby sentenced to confinement in the county jail of Cook County, for said crime of carrying concealed weapons in manner and form as charged in the indictment, whereof he stands convicted and adjudged guilty for the term of six months,"

and fined one dollar.

Upon a writ of error directed to the Criminal Court of Cook County, the record is before this court for review.

Two questions are raised in the brief filed by the defendant. First, that the finding, sentence and judgment of the court, wherein the court adjudged the defendant guilty merely of carrying concealed weapons in manner and form as charged in the indictment, fails to show that the defendant committed any crime, and therefore

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is insufficient on which to predicate a judgment; and second, that the indictment charges the commission of the alleged crime of carrying a concealed weapon on or about the person of the defendant in Cook County, whereas the evidence affirmatively shows that the gun or pistol was found on the person of the defendant in Hammond, Indiana.

The first contention of the defendant is that the finding and judgment of the court are lacking in the essential element of the crime of carrying the concealed weapon on or about the person of the defendant.

It is the rule that if a general finding of guilty in manner and form as charged in the indictment is entered, the judgment so entered upon such general finding is sufficient. People v. Kusinski, 295 Ill. 575; People v. Kuhn, 291 Ill. 184. The test to be applied ⁱⁿ determining the sufficiency of the finding of the court in the instant case is whether the finding determines the question as to the defendant's guilt, as charged in the indictment.

In the case before this court the defendant is found guilty of the crime of carrying concealed weapons. This finding is clear and certain as to what crime is charged. There is nothing left to speculation, and no element is omitted. The fact that the words, "on or about his person" are not included in the court's finding, does not create a doubt as to the meaning of the judgment entered by the court. The Supreme Court in the case of People v. Tierney, 350 Ill. 515, in construing the verdict of the jury which found the defendant guilty of robbery, said:

"A verdict is not to be construed with the same strictness as an indictment but is to be liberally construed, and all reasonable inferences will be indulged in its support, and it will not be held insufficient unless, from necessity, there is doubt as to its meaning." Citing People v. Lee, 237 Ill. 272.

The rule is that in determining the sufficiency of a verdict and a judgment of conviction based thereon, the entire record will be searched and all parts interpreted together, and a deficiency

at one place may be cured by what appears in another. See People v. Butler, 368 Ill. 635. From an examination of the whole record in this case it is clear that the finding of the defendant guilty of carrying concealed weapons established the fact that the weapon was carried upon the person of the defendant, and applying the rule as laid down in People v. Florney, supra, the record sufficiently shows that the defendant was guilty of the crime, as charged in the indictment.

The second and final question called to the attention of this court by the defendant is, that the evidence does not affirmatively show that the crime, as charged in the indictment, was committed in Cook County, Illinois.

In disposing of this question it will be well to consider the rule adopted by the Supreme Court in the case of Leinberg v. The People, 208 Ill. 15, where the court said upon this question:

"It is not necessary that some one testify, in so many words, to the place where the offense was committed, but it is sufficient if the evidence, as a whole, leaves no reasonable doubt as to the act upon which the indictment is based having been committed at the place laid in the indictment." (Porter v. People, 158 Ill. 370.)

and quotes from Heinecke v. State, 34 Neb. 14, as follows:

"The venue of an offense may be proven like any other fact, in a criminal case. It need not be established by positive testimony, nor in the words of the information; but if from the facts appearing in evidence the only rational conclusion which can be drawn is that the offense was committed in the county alleged, it is sufficient."

From the facts in the record it appears that on February 17, 1932, in response to a report that windows in a barber shop located between State and Baltimore, on Ingraham Avenue, in Calumet City, Illinois, had been broken and destroyed; that Frank Miotke, a police officer for Calumet City, proceeded to the location when he heard shots fired from a revolver on State Street between Ingraham and Wentworth Avenue; that he ran to the corner and saw a Chevrolet coupe being driven away; that he recognized the automobile as being owned by the defendant; that he chased the automobile, which disappear-

ed, and upon making inquiry heard that the car had been driven to the Savoy Hotel on State Street, located in Hammond, Indiana.

It also appears that officer Miotke, accompanied by two Calumet City police officers, went into the hotel, and in the lobby saw the defendant; that Miotke searched him and found a pistol in his coat pocket and he examined the pistol and found but one cartridge in it; that five minutes after defendant's arrest while at the Hammond Police Station Miotke said to the defendant, "That's the idea of shooting, 'Kop'," and that the defendant said, "Oh, I just shot into this building there. I wanted somebody to come out, I am going to get there. I am going to get him, even if it takes ten years. I am going to get you." (Meaning the police officer). The same officer identified the defendant's car at the Savoy Hotel as being the same automobile which was driven away from the location in Calumet City when the shots were fired.

The defendant denied that he was in Calumet City at the time the shots were fired, and from his evidence he claims he was in a restaurant in Hammond, Indiana when a friend, Joe Morris, handed the defendant a pistol a short time before he was arrested by the Calumet City police; that the same evening, prior to his arrest, he loaned his Chevrolet coupe to his friend Morris, who, without any previous arrangement for the return of the automobile, met the defendant in the restaurant in Hammond, and returned the automobile to the defendant at 3:30 A. M.

It is also part of the defendant's testimony that his friend Joe Morris came into the restaurant at the Savoy Hotel and "slipped" the gun to the defendant; that when Morris gave the gun to the defendant, he said, "Here, I am in a jam," meaning of course that Morris was in trouble.

The story told by the defendant about the receipt of the revolver and its being found in his possession, was fanciful and

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It is also part of the Government's policy to
transfer the assets of the Government of the
"United States of America" to the Government of the
"United States of America" in the event of a
change of government in the United States.

The story told by the witnesses about the receipt of the money and the other facts in the case, was consistent and

unbelievable, and no doubt the trial court considered it so. Calumet City, Cook County, Illinois, borders on the state line of Indiana, and the city of Hammond adjoins Calumet City. The truth of the several statements of the witness was passed upon by the trial court, and we are of the opinion that the record, as a whole, supports the Court's finding of the defendant's guilt. The court considered the fact that the defendant lived in Calumet City; that shots were fired from a pistol in that city; that defendant's automobile was seen leaving the place where the shots were fired, and the evidence of the admission by the defendant that he fired a shot at a building in Calumet City in order to attract the attention of an acquaintance that he was after, the pursuit of this automobile leaving the scene of the crime, and the capture of the defendant in Indiana in possession of the pistol with all but one of the cartridges fired. These facts meet the requirement that the crime was committed in Calumet City, Cook County, Illinois, as charged in the indictment.

The judgment of the Criminal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

38805

PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

v.

RUDOLPH MOURKE,

Appellant.

APPEAL FROM

CRIMINAL COURT

COOK COUNTY.

273 I.A. 612¹

Opinion filed Dec. 13, 1933

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

The defendant plead guilty to an indictment charging forgery of a bank deposit withdrawal slip in the amount of \$3,000. Evidence was heard by the trial court, and upon the plea of guilty the court sentenced the defendant to the penitentiary. The defendant was indicted at the same time for embezzlement, which indictment was nolle prossed by the court upon motion of the State's attorney.

Prior to sentence of the defendant upon the plea of guilty, the defendant filed a written application for probation, together with an affidavit of defendant's sister. Probation was denied by the court, and the defendant prayed an appeal, from the order denying defendant's release upon probation, to the Appellate Court, First District.

The petition filed by the defendant for his release on probation states, in substance, that he is 33 years of age, born in Chicago, lives with his parents and married sister; was employed by the Southwest Trust and Savings Bank for a period of 12 years, and was at the time of the forgery charged in the indictment, Assistant Cashier; that he was never arrested prior to the crime charged, nor convicted of a crime prior to the proceedings in the present case; that the defendant restored \$1,650, together with \$750 advanced by his sister, and that this total amount was paid to the National Surety Company to apply on account of the loss, for which the Surety Company was liable on its bond to save harmless the Southwest Trust and Savings

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REPORT OF THE BOARD OF INVESTIGATION

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REPORT OF THE BOARD OF INVESTIGATION

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Opinion filed Dec. 12, 1933

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bank; that thereafter the defendant delivered to his then attorney approximately \$14,000 in money, negotiable securities and an automobile to be turned over to the Surety Company by his attorney to be applied on account of his civil liability.

The defendant claims that the Surety Company promised that it would recommend his being released on probation; that defendant's former attorney embezzled the money and securities, and converted the chattels to his own use, and that the amount was not applied in a reduction of his liability to the bank; that this same attorney was subsequently convicted of crime and found to be insane.

The evidence was heard by the court in support of the defendant's petition, from which it appeared that the defendant admitted committing another forgery and also that he had embezzled \$20,000, the property of the Southwest Trust and Savings Bank, and that this sum was taken in several amounts during a period of two years.

The defendant states in his brief that the question to be determined is, whether an order entered by the court denying the release of the defendant upon probation is reviewable. The trial court, after an investigation of the defendant's application for probation, in conformity with Chap. 38, Par. 786, Smith-Hurd's Ill. Rev. Stats. 1933, denied the defendant's application.

The rule applicable in the present proceedings and which is supported by the decisions of the Supreme Court, is that the granting of probation upon application rests in the discretion of the trial court, and the refusal of the court to release the defendant upon probation is not reviewable. People v. Thaeler, 349 Ill. 330; People v. Miller, 317 Ill. 33; People v. Stover, 317 Ill. 181; People v. Bohls, 307 Ill. 318.

The answer of the defendant as to the application of this rule, is that he is in accord with the Supreme Court decisions that the order is not reviewable by the Supreme Court of this State, but

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is reviewable by the Appellate Court under Chap. 38, Par. 825, Sec. 15 of the Probation Act, Cahill's Ill. Rev. State. 1933, which is as follows:

"A defendant who shall have successfully invoked the provisions of this Act may review, by appeal in the same manner, as near as may be, as in case of appeal from the circuit courts in misdemeanors, or writ of error, any order changing, modifying or terminating the probation period. The appellate courts of this State are hereby given jurisdiction finally to hear and determine all such appeals and writs of error, and such courts may affirm, reverse or modify such orders so that the same shall conform to the provisions of this Act, and so that its purposes and the interests of justice and society shall be best subserved."

A reasonable construction of this section would seem to be that where a defendant is successful in invoking the provisions of the Probation Act, and an order is entered by the court releasing him on probation, he may appeal to this court where the order of probation is modified in its terms by the court, or where the probation period is terminated for a violation by the defendant of its terms, and the defendant is committed by the court for his crime.

This was the intent of the legislature of the State of Illinois in passing the section in question, and being so, this appeal from the order denying release of the defendant upon probation, is not properly before this court.

The appeal is therefore dismissed.

APPEAL DISMISSED.

HALL, P.J. AND WILSON, J. CONCUR.

38940

THOMAS D. COLLINS, EARLE A. SHILTON,
LEE J. LESSER, CHARLES L. SCHAEFER,
GEORGE F. KOSTER, J. L. MESNER,
EDWARD M. BERTHA and ASSOCIATION OF
REAL ESTATE TAXPAYERS, an Illinois
Corporation,

Appellees,

v.

JOSE M. PRATT, JAMES E. BISTON, GEORGE
W. REINHORE, JAMES D. STOVER, WILLIAM
WALKER, JR., and LOWELL C. NEESLER,

Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

OF COOK COUNTY.

273 I.A. 612²

Opinion filed Dec. 13, 1933

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order denying defendants' motion to vacate and dissolve a temporary injunction issued by the court.

The restraining order is in part that the defendants are restrained from conducting a meeting of the members of the Association of Real Estate Taxpayers, pursuant to a call for a meeting to be held on the 14th day of February, 1933, except as modified by the court to permit the calling of said meeting to order for the purpose of adjournment; that the defendants are further enjoined from talking or broadcasting upon the radio broadcasts contracted for by the defendant association; from interfering, obstructing and violating orders adopted by resolution by the Board of Directors of the Association of Real Estate Taxpayers Corporation, and from performing the duties of officers and members of the Executive Committee of this association while suspended.

Defendants are also restrained from taking possession of or dealing with any of the assets of the association until the further order of the court.

The motion to dissolve the injunction came before the court upon a verified bill of complaint and answers of the defendants, together with certain affidavits of members of the association, and

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273 L.A. 612

the court after giving consideration to the defendants' motion to dissolve, on May 3, 1933, denied said motion.

It is clear from a reading of the bill of complaint and the defendants' answers thereto that the contest is largely one to control the Real Estate Taxpayers Association and the assets of this corporation, which association was organized not for pecuniary profit.

The court based its restraining order in part upon the charge that the defendants were wasteful in the administration and management of the corporation; paid large sums for attorney's fees; that the salaries of its officers were paid in advance, and that the legality of contracts for the payment of monies by the Association is questioned.

The briefs of the contending parties deal with the merits of the controversy, and by the act providing for interlocutory appeals (Practice Act Para. 132, Sec. 133, Chap. 110) it was never contemplated that the court should pass upon the merits of the cause.

A motion to dissolve a temporary injunction is not necessarily a hearing on the merits, but presents the question whether it is advisable to maintain the status quo until the chancellor has had an opportunity to consider the cause upon its merits. This court has held that the matter of denying a temporary injunction rests largely within the discretion of the court. Kubl v. Clark, 261 Ill. App. 491.

The question regarding the duty of the chancellor is fully discussed, especially where the disposition of assets of the contending parties is involved, in Fishwick v. Lewis, 238 Ill. App. 403, where the court said:

to
 "A motion/dissolve a temporary injunction is not necessarily a hearing on the merits, but presents the question whether it is advisable to preserve the status quo of the matters in controversy by a continuance of the temporary injunction until a final hearing on the merits of the case."

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

THE UNIVERSITY OF CHICAGO

1. The first part of the report is a general introduction to the project, which includes a brief history of the project and a statement of the project's purpose.

233 pages - 1984 - \$12.95 - ISBN 0-819-56000-0

On the 1st of June 1941, the ship was damaged by a mine.

... ..

1957年10月1日，即十月革命四十周年，在莫斯科红场举行了盛大阅兵式。苏联领导人赫鲁晓夫在阅兵式上发表了重要讲话，强调苏联在战后取得的巨大成就，并宣布苏联将永远保持和平政策。这一讲话在国内外产生了深远影响，标志着苏联在战后国际格局中的地位日益巩固。

It is important to note that the above information is for informational purposes only and should not be used for any other purpose.

• [Bibliography](#) [List of references](#) [References](#)

[Faint, illegible handwritten notes]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

... (The following text is illegible due to extreme blurriness)

4. The Commission has also received information from the public that the Commission's decision to grant the license to the applicant was based on the applicant's financial strength and the applicant's ability to pay the license fee.

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

and will require only 14.20 mm. of space in the direction of the axis of the cylinder.

and, in fact, the only one of its kind in the world.

7. The Commission has also received information from the Government of the Republic of the Philippines that the Government of the Republic of the Philippines has been providing training and support to the Armed Forces of the Philippines (AFP) in the use of chemical weapons. The Commission has also received information from the Government of the Republic of the Philippines that the Government of the Republic of the Philippines has been providing training and support to the AFP in the use of chemical weapons.

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THE UNIVERSITY OF CHICAGO

17. The following are the values of α and β for the given functions. $\alpha = 0.5$, $\beta = 0.5$

THE UNIVERSITY OF CHICAGO

1. The first part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $t \rightarrow \infty$. It is shown that the solutions of the system (1) tend to zero as $t \rightarrow \infty$ if and only if the matrix A is stable.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research. It also provides a brief overview of the methodology used in the study.

"Where the sole object for which the temporary injunction is sought is the preservation of a fund in controversy or the maintenance of the status quo until the question of the right between the parties can be decided on final hearing, the injunction is properly allowed or maintained even where there may be a serious doubt as to the ultimate success of the complaint."

The court said quoting from the case of City of Newton v. Lewis, 35 C. C. A. 161, 79 Fed. 715,

"The granting or withholding of a preliminary injunction rests in the sound judicial discretion of the court, and the only question presented by this appeal is whether or not the court below erred in the exercise of that discretion under the established legal principles which should have guided it. The propriety of his action must be considered from the standpoint of that court * * *. The controlling reason for the existence of the right to issue a preliminary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during the litigation, as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated."

It is to be noted that the chancellor is not required to examine minutely the bill of complaint prior to the entry of an interlocutory decree for an injunction. In the case of Friedman v. Peckler, 255 Ill. App. 130, the court said:

"The purpose of a temporary injunction, when issued by a court of first instance is to preserve the matters in status quo until that court has had an opportunity to consider the cause upon its merits, or upon demurrers presented and argued. An interlocutory appeal was not intended as a short cut to an appeal tribunal, in order to dispose of a cause upon its merits, without giving the trial court an opportunity to first consider it."

* * * *

"The trial court is not required to examine minutely the bill of complaint prior to the entry of an interlocutory decree for an injunction, as the entry of such order is justly within the discretion of that court if, in its opinion, it is necessary to hold the matters in status quo until a more complete hearing can be had upon the bill. Courts of review are not inclined to interfere with this discretion, where it appears that the requirements of the statute on the granting of such interlocutory orders have been complied with by the giving of notice and bond on the part of the complainant."

On appeal from an interlocutory decree providing for the issuance of a temporary injunction, the Appellate Court will not interfere with the exercise of discretion by the chancellor in the granting of such interlocutory order, provided the provisions of the

statute providing for the issuance of an injunction are complied with.

For the reasons indicated in this opinion, we do not find that the court, in the exercise of its discretion in denying the motion to dissolve, committed error. Therefore the appeal will be dismissed.

APPEAL DISMISSED.

HALL, P.J. AND WILSON, J. CONCUR.

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JOHN BURNHAM, HUBERT BURNHAM, DANIEL
BURNHAM and CONTINENTAL ILLINOIS
NATIONAL BANK AND TRUST COMPANY OF
CHICAGO, as Trustee under Agreement
dated August 9, 1923,

Appellees,

v.

JOHN LENC, et al.,

Defendants,

Interlocutory Appeal of
HELNER LIDSTROM and HULDA LIDSTROM,

Appellants.

INTERLOCUTORY APPEAL

FROM SUPERIOR COURT

COKE COUNTY.

273 I.A. 612³

Opinion filed Dec. 13, 1933

MR. JUSTICE HEREL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by the defendants Helner Lidstrom and Hulda Lidstrom from an order appointing a receiver by the court upon a bill of foreclosure filed by the complainants, praying, as a part of the relief, for the appointment of a receiver to take possession of the lands and improvements therein described and to collect the rents, issues and profits of the building thereon.

The order entered on July 6, 1933, in part, recites that the owners of the equity of redemption, and all other necessary parties having been served with notice of the motion for the appointment of a receiver, and the court having read the sworn bill of complaint, and having heard the evidence as to the value of the property involved, and also argument of counsel for the owners of the equity and for the complainants, and it appearing to the court that the premises are scant security for the amount due, and it also appearing from the order that the court, from the evidence heard, found that it was necessary for the preservation of the premises that a receiver be appointed, and thereupon appointed the receiver named in the order, upon the receiver giving a bond to be approved by the court in the amount of \$3,000, the bond for the complainant

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FROM MEMPHIS, TENN. TO NEW YORK, N.Y.
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RE. JAMES EARL RAY, AKA; THE BROTHERS; THE BROTHERS

This is an information report received by the Memphis office

regarding the activities of the Memphis office in connection with

the case of the Memphis office in connection with the Memphis office

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Continental Illinois National Bank and Trust Company of Chicago being waived on account of said complainant being a trust company.

The defendants Helmer Lidstrom and Hulda Lidstrom, owners of the equity of redemption, urge that the appointment of a receiver before an answer is filed is erroneous in the absence of an affirmative showing of an emergency.

The motion of the complainants for the appointment, after notice to the defendants, was continued from June 30, 1933, to July 6, 1933, and after hearing the argument of defendants' counsel, the court entered an order appointing the receiver.

It does not appear from the record that the defendants objected to the entry of the order; it does appear, however, from the order that the court found as an ultimate fact that it was necessary for the preservation of the property involved that a receiver be appointed, and this, in the opinion of the court, was sufficient to warrant the action taken by the court in appointing a receiver.

The principal contention of the defendants however is that the bill of complaint is not properly verified, and therefore it was improper for the chancellor to consider the bill of complaint. The verification is substantially in the following form:

"Joseph B. Ferry, * * * on oath deposes and says that he is * * * the duly authorized agent of said complainants in this behalf; that he has read the foregoing bill of complaint; that he has personal knowledge of the matters and things therein stated; and that he knows the contents thereof and knows as a fact that the Exhibits therein set forth and attached thereto and the matters and things therein stated are true and correct."

We have considered the verification, and a fair interpretation of the language used is that the affiant has personal knowledge of the matters and things stated in the bill of complaint; that he knows the contents of the bill of complaint, and knows as a fact that the exhibits set forth in the bill of complaint and attached thereto, and the matters and things therein stated are true and correct, as charged/ in the

Continental Illinois National Bank and Trust Company at Chicago being
subjected on account of said complaint being a "false document."

The defendant's subject Illinois and Ohio National Bank, which
at the time of the complaint, was that the defendant is a resident
defendant to answer is filed in accordance to the terms of an affi-
davit showing it to be true.

The motion at the time of the complaint for the defendant, after
notice to the defendant, was sustained from June 20, 1911, to July
5, 1912, and after hearing the complaint is sustained, and the
court entered an order sustaining the complaint.

It has not been shown that the defendant
objected to the entry of the order; it has been shown, however, that
the order was not made known to the defendant and that it was made
only for the satisfaction of the defendant. It is a violation of
the order, and that, in the opinion of the court, was sufficient to
warrant the action taken by the court in sustaining the complaint.

The principal contention of the defendant however is
that the bill of complaint is not properly verified, and therefore it
was improper for the complaint to be sustained and the bill of complaint,
the verification is substantially in the following terms:

"Joseph J. Perry, * * * on oath deposes and says that he is
the duly authorized agent of said Continental Illinois National Bank;
that he has read the foregoing bill of complaint; that he
has personal knowledge of the contents and facts therein
stated; and that he knows the contents thereof and
knows as a fact that the contents thereof are true and
correct, and the matters and things therein stated
are true and correct."

A bill of complaint for verification, and a bill of complaint
Action of the defendant is that the bill of complaint is not
of the nature and things stated in the bill of complaint; and he knows
the contents of the bill of complaint, and knows as a fact that the

contents of the bill of complaint are true and correct, and
the matters and things therein stated are true and correct, as alleged.

of complaint. While the bill of complaint as verified is to be strictly construed, the rule does not operate or militate against the rule that the court is to adopt a reasonable construction of the words used in the verification. The sufficiency of an affidavit depends upon whether it is so clear and certain that a perjury charge may be sustained on it if false. The affidavit in the instant case meets this requirement.

It is urged by the defendants that the notice received by them of the application for the appointment of a receiver is faulty, for the reason that the notice is signed by only one of the complainants. The answer is, that the notice is sufficient for the purpose for which it was given, when we note from the record that the defendants appeared in court and were heard by counsel at the time the order for the appointment was considered by the court. The order and the notice of the motion for the appointment of a receiver, both bear the general filing number of the suit filed by the complainants, and from the record the application was properly made and the order justified upon the notice as given. However one question arises, and that is: Did the order for the appointment comply with Par. 55 Chap. 22 Cahill's 1929 Stats. regarding the waiver of complainants' bond? The order provides that the bond was waived in these words:

"Bond for the complainant, Continental Illinois National Bank and Trust Company of Chicago, being waived on account of said complainant being a trust company."

The verified bill of complaint charges that the matured interest due on June 7, 1933, is in the amount of \$1,590, and also that the balance of the principal of \$53,000 was due and unpaid on said date.

The complainants further charge that there is a balance due for general taxes for the year 1928 in the sum of \$1,845.87; that the taxes for the year 1930, in the sum of \$1,778.56 are due and unpaid; and further, that the taxes for the year 1931 are due in a large amount,

which is unknown to the complainants; that the present fair cash market value of the property described in the bill of complaint is \$40,000; that this amount is not sufficient to satisfy the indebtedness; and from the record the court was warranted in the appointment of a receiver.

While this court has held that the record may be examined to determine whether a bond should be required of the complainant, it is not necessary that the order appointing a receiver where notice has been given contain the facts which in the opinion of the court excuse the giving of a bond. The charges in the bill of complaint and from the evidence are sufficient to sustain the appointment of a receiver without the complainants being required to give bond to the adverse party. In the case of Central Trust Co. v. McGurn, 257 Ill. App. 45, the court considered an amendment to an order which stated:

"And upon notice and full hearing, the court being of the opinion that the filing by the complainant of a bond to the adverse party need not be required, for good cause shown, and that a receiver ought to be appointed without the filing of such bond."

and said:

"We think this amendment showed a sufficient compliance with the statute and therefore the order appealed from ought not to be reversed. Moreover, even if we were of the opinion that the amendment of the order was not properly made, we would not reverse the order because we are of the opinion that the allegations of the verified bill were sufficient to authorize the appointment of the receiver without the complainant giving bond to the adverse party. It showed that there was a default in payment of principal and interest; that the general taxes and special assessments were in default; and as a result, the property had been sold. A mechanic's lien was filed, and there is no contention that the bill did not set up such facts as would warrant the appointing of a receiver. It would therefore be an idle ceremony to reverse the order, which we will not do. Walker v. Kersten, 115 Ill. App. 130." See also Firebaugh v. Seegren, 289 Ill. App. 47.

It is interesting to note what this court said in the case of Walker v. Kersten, 115 Ill. App. 130, in considering the fact that the order did not provide that the complainant be excused from

which is subject to the jurisdiction of the court; and the court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court; and the court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court.

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The court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court; and the court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court.

It is further stated that the court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court; and the court has jurisdiction of the matter of the property described in the bill as containing is subject to the jurisdiction of the court.

giving a bond as required by the statute. The court said:

"Finally, it is contended that the order appealed from is erroneous because the complainant did not give bond to the adverse party as required by section 1 of the Act of 1903, 'concerning the appointment and discharge of receivers,' nor was any cause shown why a receiver ought to be appointed without such bond. In this we think the court erred. But the error was not harmful. The statute provides that the complainant shall give a bond to the adverse party conditioned to pay all damages, etc., 'in case the appointment of such receiver is revoked or set aside.' *Hard R. S.*, ed. 1903, p. 331. The case was a proper one for the appointment of a receiver. The order appointing a receiver, therefore, will not be set aside or revoked, and there could be no recovery by appellant on the bond if one had been given."

The defendants on this appeal question the sufficiency of the bill of complaint in failing to disclose the identity of the beneficial owners of the notes, who, in any event, are necessary parties to the bill. The complainants charge in the bill of complaint that they are the holders and owners of the notes secured by the bill of complaint, and such charge is sufficient for the purpose of a motion for the appointment of a receiver. The merits of the litigation are not to be determined by this court upon an interlocutory appeal; in other words, by this short cut this court will not consider matters that are final in their nature and tend to determine the merits of the litigation - that is for the chancellor upon a final hearing.

We are of the opinion that there is no error such as would justify a reversal of the order appointing a receiver.

ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

26584

HUGH SCOTT,

Appellee,

v.

MAX S. SICKLE, JR.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 612

Opinion filed Dec. 13, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff, Hugh Scott, brought his action against max S. Sickle, Jr., the defendant, on a note in the sum of \$500, together with interest at six percent per annum from June 25, 1925. The cause was heard by the court without a jury and a finding had in favor of the plaintiff for the sum of \$751.79, upon which finding judgment was entered.

Plaintiff testified that he operated a small grocery store at 8336 South Halsted street and that he was 67 years of age; that in 1925 he brought a suit against Thomas J. Manning, president of the Board of Trustees of the Greer Fabricators Company and the Greer Fabricating Company, which was a common law trust. His claim was based upon the fact that he had previously paid the defendant in that proceeding \$500, to be invested in the Company, which he was seeking to recover; that in that proceeding the defendant Manning was represented by Sickle, who asked him, Scott, if some arrangement could not be made by which the proceeding could be discontinued against the defendant and some adjustment of the claim made; that the defendant Sickle told him he, Sickle, had considerable money invested in the Greer Fabricators Company and did not want anything to happen to it; that subsequently plaintiff met Sickle at Sickle's office where the document in evidence was drawn up by Sickle and given to the plaintiff. The note was not signed by Sickle, but on the back was an endorsement by the defendant Sickle and in his handwriting, as claimed by the plaintiff, which read:

10000

10000

10000

10000

10000

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2731A.615

Opinion filed Dec. 18, 1932

RE. PETITION OF THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

FOR AN ORDER OF THE COURT TO REVOKE THE

ORDER OF THE COURT MADE ON JANUARY 10, 1932,

IN CASE NO. 10000, IN WHICH THE

PLAINTIFFS ARE THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE DEFENDANTS ARE THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

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AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

STANDARD OIL COMPANY OF INDIANA, INC.,

AND THE BOARD OF DIRECTORS OF THE

"Installment Note, Max E. Sickle, Jr. to Hugh Scott, Date June, 1935, amount \$500.00."

Plaintiff testified that he made demand for payment on the note from time to time, but was informed by the defendant that he was not able to pay but would when he was able.

Defendant denied the execution of the note and denied that the writing upon the same was made by him.

It is the rule of this state that it is not necessary that the signature to the note be upon any particular part of the instrument if it is signed with the intent to be bound. This, however, must be shown by satisfactory evidence. Kistner v. Peters, 223 Ill.607.

The question involved was purely one of fact. This court will not disturb the finding of a trial court unless, in its opinion, the testimony is such that the finding could not have been properly arrived at by the trial court. There was evidence standing alone on the part of the plaintiff which would have justified the finding and this court will not disturb it.

For the reasons stated in this opinion the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND KENEL, J. CONCUR.

[illegible]

[Faint, illegible handwritten notes]

AND NO OTHERS. THE ABOVE ARE THE ONLY PERSONS TO BE INTERVIEWED.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

that I must have been out to influence the police, therefore

THE EDITOR OF THE NEW YORK TIMES

End of the line at 11:30 PM. To sign out at 11

THE ALPHABETICALLY LISTED NAMES OF THE MEMBERS OF THE BOARD OF DIRECTORS OF THE NATIONAL ASSOCIATION OF REALTORS ARE AS FOLLOWS:

[illegible][illegible]

THE UNIVERSITY OF CHICAGO

minutes of the meeting were taken by the Secretary and read at the meeting.

the testimony is that the latter could not have been the author of the letter.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

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1997-1998

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36599

PEOPLE OF THE STATE OF ILLINOIS, ex rel
THOMAS F. MYERS, JR.,

Appellee,

v.

NORTH SHORE PARK DISTRICT OF COOK COUNTY,
ILLINOIS, a Municipal Corporation, HAROLD
E. LEOPOLD, HYMAN KINZELBERG, and HOWARD
F. SAVAGE as Commissioners of said District,
and MARY RICHARTZ, as Secretary of said
District,

Appellants.

APPEAL FROM

FIREBURN WRIT

OF MANDAMUS OF

THE SUPERIOR

COURT, COOK

COUNTY.

273 I.A. 613

Opinion filed Dec. 13, 1933

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court directing that the writ of mandamus issue as prayed for in the petition, directed to the North Shore Park District of Cook County, Illinois, a municipal corporation, Harold E. Leopold, Hyman Kinzelberg and Howard F. Savage, as Commissioners of said District, and Mary Richartz, as Secretary, commanding them that they forthwith spread upon the records and minutes of said North Shore Park District of Cook County, Illinois, a declaration that the petitioner, Thomas F. Myers, Jr., was duly elected a commissioner of said district on April 7, 1931, and commanding them to seat him as one of the commissioners.

The matter was heard in the trial court on petition, general and special demurrers thereto, and the court assessed damages in favor of the petitioner Thomas F. Myers, Jr. in the sum of \$250.

Counsel for defendants insist that the petition contains:

First, no positive allegations of any right on the part of the relator, Myers, Jr., against the North Shore Park District;

Second, in effect is practically the same as the first.

Third, that the allegation in the petition that the matter had been adjudicated in a quo warranto proceeding does not sufficiently show the identity of the parties; and

Fourth, the court erred in assessing damages without

proof in support of the claim.

We have examined the petition and find it sufficiently answers the requirements and that the court properly held it was good upon demurrer. The allegations contained in the petition were amply sufficient, particularly as it contained an allegation to the effect that in a quo warranto proceeding in the Circuit Court of Cook County, known as case No. B-33443, growing out of the same allegation, that the court found that the petitioner Myers, Jr. had been duly elected a Commissioner of the North Shore Park District of Cook County. This court will take cognizance of this municipality together with its name and location. Moreover, this matter has been before this court before as case Sen. No. 35339, and the records sustain the proposition that there was such a park district and that there was such an election held at the time stated. By the demurrer defendants admitted the allegation of the petition that the judgment was entered in the Circuit Court finding that there was an election duly called and held at which the relator was elected a commissioner of the said park district.

After order commanding the writ to issue, the Superior Court, as shown by its order, heard evidence as to the amount of damages. The order contains the following language:

"* * *the Court having heard the arguments of counsel and being fully advised in the premises, and the Court having heard testimony as to the amount of said damages, it is further Ordered that said defendants pay to the relator, as and for his damages wrongfully sustained, and as attorneys' fees the sum of Two Hundred Fifty Dollars (\$250.00), together with the costs of this proceeding * * *."

This was not an order by default but after the entry of appearance and all parties in court.

The same parties were before this court on appeal from an interlocutory order of the Superior Court in a proceeding involving the same question brought by the North Shore Park District and some of the defendants to this proceeding against Thomas F. Myers, Jr., and

others, in which the defendants here, who were the plaintiffs there, charged that the North Shore Park District of Cook County, Illinois, was a municipal corporation and that Myers and others were creating a disturbance in an effort to be seated as members of the board. This court reversed the order granting the injunction on the ground that the trial court did not have jurisdiction of the matter. From the petition it appears that thereafter Myers, Jr. and others were declared duly elected commissioners for that park district. This proceeding before us is the third proceeding growing out of the election which was held April 7, 1931, and so far as the record of these proceedings discloses, petitioner has not as yet been inducted into the office to which he is evidently entitled.

It is essential that there should be an end to litigation and in order to accomplish justice the courts will not indulge in refinements that will defeat that end. This court will take judicial notice of the fact that the amount of the damages returned in view of the extent of the litigation could not possibly compensate the relator Myers, Jr. for the expense and damages sustained. It is insisted that the only damages that could be assessed were those which occurred through loss of salary pertaining to the position. The statute on mandamus provides that the petitioner shall recover his damages and costs, and does not refer to salary. The office in question carried no salary. Moreover, no objection was made nor exception taken to the evidence offered.

For the reasons stated in this opinion, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND NEBEL, J. CONCUR.

operated, in which the defendant was, and was the defendant's agent,
charged that the defendant was liable for the same, Illinois,
was a municipal corporation and that the defendant was operating
a business in an effort to be elected as a member of the board.
This court reversed the order granting the injunction on the ground
that the defendant was not liable for the same, Illinois, from
the position it took in that respect, yet, it, and others who
had not fully elected members of the board, but that was distinct. This
provision before us is the only provision existing out of the
election which was held April 7, 1911, and as far as the record of
these provisions disclosed, defendant has not as yet been elected
into the office to which he is presently entitled.

It is submitted that there should be an end to litigation
and in order to accomplish this purpose the court will not interfere in
reference to the defendant's claim, but will leave all such judicial
action of the court that the amount of the damages returned in view of
the extent of the litigation would not possibly compensate the
defendant for the cost of the expense and damages sustained. It is im-
posed that the only damages that could be recovered were those which
occurred through loss of salary resulting from the position. The
defendant in his petition avers that the defendant shall recover his
damages and salary, and does not refer to salary. The office is
questioned whether or not salary. However, no objection was made nor
exception taken to the evidence in regard to salary.

For the reasons stated in this opinion, the judgment of
the circuit court is affirmed.

JUDGMENT AFFIRMED.

WILLIAM H. HARRIS, J. CLERK.

36950

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JOHN WIKSTROM,
Defendant in Error,

vs.

JAMES M. FERON,
Plaintiff in Error.

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ERROR TO CIRCUIT COURT
OF COOK COUNTY.

273 L.A. 613⁷

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error the reversal is sought of an order vacating a prior order which awarded the writ in a mandamus proceeding.

Plaintiff, on the relation of John Wikstrom, commenced a suit in mandamus directed to defendant, James M. Feron, seeking to have him perform certain duties as a police magistrate of the Village of Oak Park; he filed an answer, stating that he had been duly elected a police magistrate but that in March, 1930, the Village of Oak Park passed an ordinance purporting to abolish said office, and he asked the court to determine his status.

The cause was heard by Judge A. W. Summers, a judge of the City court of Eldorado, Illinois, holding a branch of the Circuit court of Cook county, who on June 26, 1931, entered an order finding that the ordinance purporting to abolish the office of police magistrate in Oak Park was of no force and effect; that the defendant was still the police magistrate of the Village of Oak Park, and ordering the writ of mandamus to issue. July 15th, within the term, Robert E. Cantwell, Jr., formerly the village attorney for the Village of Oak Park, and who had represented the Village in certain mandamus cases involving the title of defendant to the office in question, filed a sworn petition setting forth a number of reasons why Judge Summers should vacate the order of June 26th. Among other matters set forth in this petition, it was asserted that before Judge Klarkowski in the Circuit court of Cook county a suit involving

THE COURT OF THE STATE OF ILLINOIS
IN THE CIRCUIT COURT OF THE JUDICIAL DISTRICT OF THE
SOUTHERN DISTRICT OF ILLINOIS

JAMES M. KANE,
Plaintiff in Error.

273 I.A. 613

1. JAMES M. KANE, Plaintiff in Error, vs. JAMES M. KANE, Defendant in Error.

This writ of error was granted in order
to review the judgment of the Circuit Court of the
Southern District of Illinois, entered in the case of
James M. Kane, Plaintiff in Error, vs. James M. Kane,
Defendant in Error.

The record shows that on the 1st day of
January, 1901, the Circuit Court of the Southern
District of Illinois, entered a judgment in the case of
James M. Kane, Plaintiff in Error, vs. James M. Kane,
Defendant in Error, awarding to the plaintiff a
judgment of \$100.00, with interest thereon from the
1st day of January, 1901, to the 1st day of
January, 1902, and costs of suit. The defendant
thereupon appealed to the Supreme Court of the State
of Illinois.

The case was heard by Judge A. J. Lawrence, a
Justice of the Peace, at the Circuit Court of the
Southern District of Illinois, entered an order
granting a writ of error, and on the 1st day of
January, 1902, the Circuit Court of the Southern
District of Illinois, entered a judgment in the case of
James M. Kane, Plaintiff in Error, vs. James M. Kane,
Defendant in Error, awarding to the plaintiff a
judgment of \$100.00, with interest thereon from the
1st day of January, 1901, to the 1st day of
January, 1902, and costs of suit. The defendant
thereupon appealed to the Supreme Court of the State
of Illinois.

the title of the defendant Feron to the office of police magistrate of the Village of Oak Park had been heard, and that it was there decided that such office did not exist, and the petition for mandamus in that case was denied.

The petitioner further asserted that another similar case involving the same question was heard before Judge Kavanaugh of the Superior court of Cook county, who likewise held that the office of police magistrate of the Village of Oak Park did not exist and denied the petition for the writ of mandamus. The petitioner alleged that no office of police magistrate in the Village of Oak Park had since been established and that the litigants were estopped by the judgments of Judges Klarkowski and Kavanaugh.

Judge Summers thereupon, after hearing of evidence and arguments, found that the allegations in the petition of Mr. Cantwell were true and it was thereupon ordered that the writ of mandamus theretofore issued be quashed "and the said cause stand as if no order had been entered." Subsequently, Judge Summers added to the order that the finding of fraud set out in the order was predicated solely upon the fact that the Circuit court and the Superior court of Cook county had theretofore passed upon and decided the issues involved in this suit, which facts had not been disclosed to that court. An appeal was prayed for but not perfected. The ^{relator's} ~~petitioner~~, by this writ of error, seeks the reversal of this order.

It is unnecessary to pass upon the various matters presented by the briefs for the reason that the order which we are asked to reverse is not a final order. It vacated the previous order and ordered "that said cause stand as if no order had been made or entered therein." The cause, therefore, is still pending in the Circuit court.

of the village of Ghat. It had been known, and that it was there
 doubted that each office did not exist, and the relation for man-
 agement in this case was as follows:

[illegible]

THE UNITED STATES DISTRICT COURT, DISTRICT OF COLUMBIA
DOES hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files of this Court.
WITNESS my hand and the seal of this Court at Washington, D.C., this 1st day of May, 1910.
J. H. HARRIS, Clerk of the Court.

It is necessary to bear upon the various matters presented by the artist for his record that the order which we are asked to reverse is not a final order. It involves the previous order and ordered "that all cases filed in it be either set aside or amended therein." The same, therefore, is still pending in the Circuit Court.

THE NATIONAL ARCHIVES COLLEGE PARK, MARYLAND

Ill. 184, it was held that the action of mandamus is governed by the same rules applicable to other actions at law. A judgment is final only when it terminates the litigation between the parties upon the merits. People ex rel. Bass et al. v. Village of Niles Center, 306 Ill. 145.

This court has no jurisdiction to consider this cause in its present state, and the writ of error is dismissed.

WRIT DISMISSED.

Matchett, P. J., and O'Connor, J., concur.

III. 104. It was held that the action of members in passing the
 the new rules was valid in the absence of any other action on the part of
 the body and that it was not necessary to show that the members
 were acting in good faith. People v. People, 104 Ill. 2d 104.
 Certified, 104 Ill. 2d 104.

This court has no jurisdiction to consider this matter in
 the present state, and the writ of error is denied.
 writ denied.

Witness, E. J. and W. J. 1st, second.

36547

S. MATHOSIAN et al.,
Appellants,

v.

B. KEVORKIAN et al.,
Appellees.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

273 1.A. 613³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

S. Mathosian, A. Paboojian and M. Gouljian, complainants, as chairman, secretary and treasurer, respectively, of the Central Council of the Armenian Reconstruction Union of Chunkoush, not incorporated, but organized as a voluntary association not for profit, filed a bill of complaint March 28, 1928, and an amendment thereto, in the Superior court for an accounting, injunctional and general relief against B. Kevorkian, Markar Erimoyian and H. Carigian (hereinafter referred to as defendants), as custodians or trustees of a fund of \$2,938.46 belonging to the Chicago branch of the above named society. Defendants filed their answer April 27, 1928, denying complainants' right to an accounting or to any of the relief prayed for. The Central Trust Company, also made a defendant, answered that it had issued its certificate of deposit to Kevorkian and Carigian for \$2,938.46, which certificate is still due and outstanding. Kevorkian and Carigian admit that this money was deposited by them for the Chicago branch of the association. The cause was referred to a master in chancery to take proofs and report his conclusions. The master's report was filed June 30, 1931, and November 23, 1932, defendants' objections to the master's report were sustained by the court

THE UNIVERSITY OF CHICAGO

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2. In the HALLWAY, B.
- 21/10/1941

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316.A.1375

THE UNIVERSITY OF CHICAGO

2. Defendant, A. Rosenberg and M. J. Rosenberg, complainants,
 an organization, voluntary and fraternal, respectively, of the Central
 Council of the American Economic Union of Chambers, not
 incorporated, but organized as a voluntary association not for
 profit, filed a bill of complaint March 22, 1932, and an amendment
 thereto, in the district court for an accounting, injunctive
 and general relief against M. J. Rosenberg, Walter Rosenberg and
 M. Rosenberg (hereinafter referred to as defendants), as co-defendants
 or trustees of a fund of \$2,928.46 belonging to the Chicago branch
 of the above named society. Defendants filed their answer April
 27, 1932, denying complainants' right to an accounting or to any
 of the relief prayed for. The Central Trust Company, also made a
 defendant, answered that it had loaned the certificate of deposit
 to Rosenberg and Rosenberg for \$2,928.46, which certificate it
 still has and outstanding. Rosenberg and Rosenberg admit that
 this money was deposited by them in the Chicago branch of the
 association. The cause was referred to a master in equity
 to take proofs and report his conclusions. The master's report
 was filed July 10, 1932, and November 27, 1932, respectively,
 objections to the master's report were sustained by the court

and a decree was entered dismissing complainants' bill for want of equity. This appeal seeks to reverse the decree.

Complainants sought by their bill to compel defendants to turn over 75% of the above sum of money, which belonged to the Chicago branch of the society, to the central council of the organization whose office was in the city of New York, and the other 25% to another Chicago branch with which complainants and other members of the central council attempted to supplant the original Chicago branch, after its proclaimed dissolution by the central council for alleged violations of the by-laws of the central organization, principal of which was its failure to comply with the demand of the central council for 75% of its funds.

Their bill alleged that complainants were officers of the central council, Armenian Reconstruction Union of Chunkoush, organized in August, 1919, and that they were proceeding on behalf and with the consent of its members throughout the United States; that the purpose of the organization was to render financial assistance to Armenian immigrants settling in America and to educate them to become useful and desirable citizens. (Purpose misstated. The real purpose as indicated by the by-laws, letters and other documents in evidence was the reconstruction and re-establishment of the village of Chunkoush, Armenia, whose residents were expatriated by the Turks during the World war. The by-laws of 1925 definitely stated that purpose, and the further purpose to transport back to Chunkoush its deserving and destitute people wherever they might be found, and to protect the civil rights of Chunkoushans in all countries or colonies.) That at the time of its organization by-laws were adopted by the society (bill alleges that the by-laws set forth therein were adopted in 1919, but they were in fact adopted in 1925) to regulate its business

and a letter was written to the 'Committee' with the view
of reply. This appeal was to review the course
(Committee) which will be to compel the
to take care of the money, which belongs to the
which is part of the society, to the central council of the
organization whose office was in the city of New York, and the
other 80% to another office branch with which complaints and
other members of the central council were supposed to supply the
original office branch, after the specified allocation by the
central council for alleged violation of the by-laws of the
central organization, principal of which was the failure to comply
with the terms of the central council for 100% of its funds.
Their bill alleged that complaints were alleged to
the central council, American Federation Union of Chicago,
organized in August, 1919, and that they were proceeding on behalf
and with the consent of its members throughout the United States;
that the purpose of the organization was to render it useful
assistance to American immigrants settling in America and to
assist them to become useful and contributive citizens. (purpose
mistaken. The real purpose as indicated by the by-laws, letters
and other documents in evidence was the reconstruction and re-
establishment of the village of Chumash, Arizona, whose residents
were represented by the Union during the civil war. The by-laws
of 1919 definitely stated that purpose, and the former purpose
to transport back to Chumash the knowledge and scientific people
whom they claim to know, and to protect the civil rights of
Chumashians in all countries or colonies.) That at the time
of the organization by-laws were adopted by the society (bill
alleged that the by-laws and forth therein were adopted in 1919,
but they were in fact adopted in 1923) to regulate the business

and conduct, and the business and conduct of its branches and members; that branches were organized in various parts of the United States whose rights and duties were governed by the by-laws; that the central council of the Union sanctioned the organization of the Chicago branch which observed the by-laws until about 1925; that prior to 1925 the Chicago branch delivered to the central council upon its demand its funds up to 75%; that defendants were elected officers and trustees of the Chicago branch in December, 1926, for a term of one year; that they refused to call an election in December, 1927, as provided in the by-laws but continued to hold their respective offices; that in November, 1926, the central council in conformity with the by-laws demanded that defendants deliver to it 75% of the accumulated funds belonging to and held in trust by them for the Chicago branch of the Union; and that defendants refused in violation of the by-laws to comply with the demand or render an accounting of the funds held by them.

The amendment to the bill of complaint asserted that in March, 1928, certain members of the Chicago branch called a meeting, pursuant to notice, for the purpose of electing officers of that branch; that an election of officers was held; that it became and was the duty of defendants to turn over to the newly elected officers such money or property as defendants held in trust for the new Chicago branch and for complainants; and that the newly elected officers demanded in behalf of themselves, as well as complainants, that defendants turn over to them all records, money, property and effects of the original Chicago branch.

Defendants' answer denied all of the material allegations of the bill and asserted that they were not connected in any way

and conduct, and the business and conduct of the branches and members; that by order were organized in various parts of the United States these rights and duties were governed by the laws; that the central council of the Union sanctioned the organization of the Chicago branch which operated the by-laws until about 1923; that prior to this the Chicago branch delivered to the central council upon the demand for funds up to 1923; that delinquents were elected officers and members of the Chicago branch in December, 1923, for a term of one year; that they received as well as election in December, 1923, as provided in the by-laws but continued to hold their respective offices; that in December, 1924, the central council in conformity with the by-laws demanded that delinquents deliver to it 75% of the accumulated funds belonging to and held in trust by them for the Chicago branch of the Union; and that delinquents refused in violation of the by-laws to comply with the demand or render an accounting of the funds held by them.

The statement to the bill of complaint asserted that in March, 1926, certain members of the Chicago branch called a meeting, pursuant to notice, for the purpose of electing officers of that branch; that an election of officers was held; that it became and was the duty of delinquents to turn over to the newly elected officers such money as properly as delinquents held in trust for the new Chicago branch and for compensating; and that the newly elected officers demanded in behalf of themselves, as well as delinquents, that delinquents turn over to them all treasure, money, property and effects of the original Chicago branch.

Delinquents, however denied all of the material allegations of the bill and asserted that they were not concerned in any way

with complainants nor the Central Council of the Armenian Reconstruction Union of Chunkoush, but collected the money in question as officers of the Armenian Reconstruction Union of Chunkoush, Turkey; that December 9, 1913, they organized a society known as the Reconstruction Association of Chunkoush, Turkey, (sometimes known as the Armenian Reconstruction Union of Chunkoush, Turkey) which never became a part of the organization represented by complainants; and that their society had at all times acted independently of the central council heretofore referred to.

Complainants contend that the Chicago branch during its entire existence was a member branch of the Armenian Reconstruction Union of Chunkoush of which the central council was the governing body and was at no time an independent organization; that the new Chicago branch, which the central council authorized as a successor to the original Chicago branch after its dissolution had been ordered, was since March 12, 1928, the date upon which it met and essayed to organize and elect officers, and is now the only legally constituted Chicago branch; ^{that} none of the defendants have any right, title or interest in the funds on deposit in the names of Kevorkian and Carigian; and that under the by-laws of the Reconstruction Union of Chunkoush the central council is entitled to 75% of the funds and the reorganized or successor Chicago branch is entitled to the remaining 25% thereof.

Defendants' theory is that they held the funds in question in trust as the officers and representatives of the "Reconstruction Association of Chunkoush, Turkey," a society which was not a part of and functioned independently of the central council of the Armenian Reconstruction Union of Chunkoush; and that, in any event, a court of equity would not compel them to deliver to complainants

[illegible]

The first conference was a meeting of the Executive Council of the
 International Union of Pure and Applied Chemistry, which was held in
 London in 1913. The purpose of this conference was to discuss the
 question of the standardization of chemical nomenclature and
 to establish a permanent body to deal with this question. The
 result of this conference was the formation of the International
 Union of Pure and Applied Chemistry, which is now the largest
 scientific organization in the world.

money belonging to the Chicago branch or recognize the claimed right of the central council to dissolve the original Chicago branch.

The evidence disclosed that the "Reconstruction Association of Chunkoush, Turkey," was incorporated December 18, 1920, by members of the original Chicago branch which was organized in December, 1918, under the name of the "Reconstruction Union of Chunkoush, Chicago Branch," and the evidence further conclusively established the fact, as the master found, that subsequent to the above incorporation neither the original Chicago branch nor its members used the incorporated name or functioned as such corporation. The master's finding and conclusion on this issue was proper and we hold that defendant's contention that the Chicago branch functioned as a corporation and under the above incorporated name is without merit.

It appears that in December, 1918, shortly after the World war armistice, a group of Chicagoans, former residents of Chunkoush, Armenia, met and formed an organization known as the "Reconstruction Union of Chunkoush, Chicago Branch," for the purpose of expediting the return to their own country of destitute Armenian refugees who had been exiled during the war and also for the purpose of reconstructing their native village of Chunkoush as a suitable home for their countrymen. A constitution and by-laws were adopted, the aims and purposes of the organization were proclaimed to Choukoushans throughout the United States by the Armenian newspapers, and the Chicago members assisted in establishing similar societies in other cities of the country with the result that, upon the invitation of the Chicago organization, delegates from three similar societies of other cities met in convention in Chicago in August, 1919, with delegates from the

being changed to the extent which is necessary for the
light of the subject matter to be treated and which is
desired.

The following is a list of the names of the

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members of the committee, and the names of the

Chicago branch and organized the "Union for the Reconstruction of Chunkoush" and adopted by-laws which provided, among other things, for the creation of a "Central Executive Council."

It appears, from a careful examination and analysis of the documentary and other evidence contained in the record, to have been the intention of the local branches not to grant to the central council any absolute control over their funds, but to use it for the distribution and application of the collective contributions of the local branches in a more expeditious and satisfactory manner toward carrying out the purposes of the Union, and to reduce to order and method the relief of deserving and destitute Chunkoushans wherever they might be located. The original central organization functioned but a short time. The evidence discloses that it went out of existence shortly after its inception because of failure of the branches to contribute, and also because of the misuse or misapplication by its officers of funds entrusted to it, and the original Chicago branch continued to carry on as an individual and separate society until the then existing local branches at Philadelphia, New York city, Lawrence, Mass., and Chicago sent delegates to a convention that met in Philadelphia in July, 1925, at which time and place another central council was established. The evidence also disclosed that the same motives and purposes actuated this gathering that prompted the calling of the convention of 1919, - the expeditious and satisfactory distribution and application of the collective funds to be contributed by the various local branches for the succor and relief of native Chunkoushans in various parts of the world. While the Chicago branch sent none of its members as delegates, it was represented in the convention by a delegate from one of the eastern cities who had credentials and was authorized to act in its behalf. This

Chinese branch and organized the "China League for Human Rights" and adopted by the League for Human Rights, which was the first of its kind in the world.

It was the first of its kind in the world.

the movement and other evidence contained in the report, to

have been the foundation of the League for Human Rights, but so

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convention declared in favor of functioning as the "Armenian Reconstruction Union of Shunkoush, Organized August, 1919," and adopted by laws, the material sections of which, pertinent to this proceeding, are as follows:

"Article 6. (c) Each branch as aforesaid has a right to deposit the money collected at a local bank, legally recognized, under the names of the chairman and treasurer, who shall be under security. Upon demand, the branches obligate themselves to send to the Central Administration from twenty-five per cent (25%) to seventy-five per cent (75%) of the money collected, which is to be used for the purpose of our organization.

"(e) A branch will be considered dissolved when its members constitute less than five members.

"(f) When a branch is dissolved the property and seal must be delivered up to the Central Administration."

"Article 7. (a) The administration of a branch shall be administered by three to five members.

"(b) The administration or officers shall be elected at the end of the year in the meetings of all branches, with the secret, equal and general votes.

"(d) The office of such officers and trustees duly elected shall be one year. The old officers may be re-elected."

"Article 9. (a) The Central Council is composed of five members.

"(b) The Central Council is elected at the meeting of the convention and it shall be responsible for her activities to that body.

"(c) The Central Council will conduct the general activities of the organization.

"(d) They will invite the branches to the meeting of the Convention and when necessary, an extraordinary convention.

"(e) The Central Council shall be generally responsible for the treasurer of the organization."

All correspondence, and the business of both the local branches and the central body, was conducted in the Armenian language, and an inspection of the record indicates that it was difficult for the parties to this suit to agree on the proper interpretation of the multitudinous documentary exhibits. Members of the various local branches were in large part illiterate and the record discloses considerable inaptitude and ignorance of the business in hand. They were imbued with high ideals and lofty purposes, and evinced a fervent desire to assist their compatriots in need, and were simply seeking the best, surest and safest manner

and the following information was obtained:

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1. The Council shall be composed of five members.

2. The Council shall be elected by the General Assembly for a period of three years.

3. The Council shall be responsible for the day-to-day management of the Fund.

4. The Council shall submit an annual report to the General Assembly.

5. The Council shall have the authority to make decisions on the Fund's investments and expenditures.

6. The Council shall be assisted by a Secretary and other staff members.

7. The Council shall meet at least once a year.

8. The Council shall have the power to call special meetings.

9. The Council shall have the power to request information from the General Assembly.

10. The Council shall have the power to request information from the Executive Director.

[illegible]

of applying the funds of their local branches for the accomplishment of their objects when they organized the central council as their collective distributing agency. It must be conceded that neither any local branch nor its members were to be the recipients of any material benefits from the central council. That body, the evidence shows, was merely to investigate, ascertain and locate exiled Chukcheians requiring relief and to disburse the relief funds contributed by the local branches for the purpose of returning them to their native land.

It must be held, as a matter of law and equity, that the central council possessed only such rights and powers as were expressly granted to it by the local branches. It is inconceivable that the local branches intended to confer on the central council the arbitrary power of exacting from them 75%, or any other considerable portion of their funds, without a specific designation that the money was immediately necessary for relief distribution as indicated in its request or demand.

Complainants predicate their claim to 75% of the funds of the Chicago branch held by defendants on the following provision of the by-laws adopted in 1925:

"Each branch as aforesaid has a right to deposit the money collected at a local bank, legally recognized, under the name of the chairman and treasurer, who shall be under security. Upon demand, the branches obligate themselves to send to the Central Administration from twenty-five per cent (25%) to seventy-five per cent (75%) of the money collected, which is to be used for the purpose of our organization."

It will be noted that this section presupposes that any money paid by the branches upon the demand of the central council "is to be used for the purpose of our organization." A reasonable interpretation and construction of the language of this by-law, in the light of all the evidence, compels the conclusion that it was the intention of the local branches in this grant of power to the

central council to contribute to it from 25% to 75% of their funds, only in the event that particular relief projects were presented by the central council to the branches meriting and necessitating such contributions.

In November, 1926, the central council called on the Chicago branch for a contribution of \$1700, and on the other branches for various amounts to cover the expense of returning certain refugees from Aleppo, Syria, to Chunkoush. This demand was recognized to the extent that the Chicago branch at one of its meetings voted to contribute the above amount, but later was advised that it was unnecessary to make the contribution as an earthquake had precluded the accomplishment of this undertaking. Since its establishment under the by-laws of 1925, no such exercise of power had been attempted by the central council as its arbitrary demand of payment by the Chicago branch of 75% of its total resources, without a statement of the purpose for which it was to be used.

No evidence was offered before the master to sustain the allegation of complainants' bill that the central council sanctioned the organization of the original Chicago branch; or that prior to 1925 the Chicago branch delivered to the central council, upon its demand, up to 75% of its funds. The evidence disclosed rather that the Chicago branch was the first society organized (1913) in the United States for the reconstruction of Chunkoush; that it assisted in the establishment of the central council of the Armenian Reconstruction Union of Chunkoush in 1925; that it made no payments to any central council or committee from 1920 to 1925; that its payments or contributions to the central council, after its organization in 1925, consisted of a total of \$197 for the period from July, 1925, when the

central council to contribute to its work and to the work of their
 friends, only in the event that the central council is not
 presented by the central council as the proper authority and
 representative with respect to the work of the central council.

In November, 1922, the central council called on the

the central council for a contribution of \$1000, and on the other
 branches for various amounts to cover the expense of returning
 certain refugees from Japan, Korea, and Manchuria. This demand
 was recognized by the central council as the proper amount of one of
 its regular voted contributions the above amount, but later was
 advised that it was necessary to make the contribution as an
 emergency has provided for the establishment of this undertaking.

Since the establishment under the terms of 1922, no such
 exercise of power has been attempted by the central council as
 the arbitrary demand of payment of the Chinese branch of 1924 of
 its total resources, without a statement of the purpose for
 which it was to be used.

The witness was asked before the committee to explain

the alleged violation of the constitution, will that the central council
 maintained the organization of the central council in Japan; or
 that prior to 1922 the Chinese branch delivered to the central
 council, upon the demand, up to 1924 of the funds. The witness
 explained that the Chinese branch was the first body
 organized (1918) in the United States for the representation
 of Chinese; that it was included in the establishment of the
 central council of the Chinese Association under the Chinese
 in 1922; that it was an affiliate of the central council of
 organized from 1920 to 1922; that the purpose of contributions
 to the central council, after the organization in 1920, consisted
 of a total of \$100 for the period from July, 1922, when the

Philadelphia convention was held, until July, 1926, when the convention was held in Union city, N. J.; and that the following year, ending with the convention in Lawrence, Mass., in July, 1927, its payments to the central council were \$34.70.

The evidence conclusively demonstrates that none of the branches contemplated a grant of power to the central council to make a general levy upon the treasury of a local branch, or recognized its right to demand payment from a branch except for a specific purpose within the scope of the objects for which the society was established. We are convinced that none of the branches intended, when they created the central council in 1925, to invest it with power to reach out and take unto itself the major portion, or in fact any portion, of their funds without a definite understanding that the money was to be spent for some relief project to which the society was dedicated.

The evidence fails to reveal that the central council during the entire period of its existence, commencing with the convention of 1925, concerned itself with or called upon the branches to support financially any concrete relief project except its endeavor to return to Armenia the ten Chunkoushans (tannery workers) who were located in Aleppo, Syria, and who have been heretofore referred to. The record disclosed, moreover, that the Chicago branch repeatedly urged that active steps be taken by the central council to transport Chunkoushans to their homeland, particularly those of them that had been located in France and Syria.

We are clearly of the opinion that complainants' position is untenable, and we are aware of no legal or equitable principle that supports their contention that defendants were bound to respect the ultimatum of the central body, constituted as it was, and

Philadelphia convention was held, until July, 1937, when the convention was held in Union City, N. J., and then the following year, ending with the convention in Lawrence, Mass., in July, 1937. The payments to the central council were \$34,700.

The evidence conclusively demonstrates that none of

the promises was fulfilled in regard to the central council to make a general levy upon the treasury of a local branch or to grant the right to demand payment from a branch except for a specific purpose within the scope of the objects for which the society was established. The law provided that none of the promises intended, when they entered the central council in 1937, to invest it with power to raise and take care itself the major portion, or in fact any portion, of their funds without a definite understanding that the money was to be spent for some relief project in which the society was interested.

The evidence fails to reveal that the central council

within the entire nation at its existence, conformity with the constitution of 1937, rendered itself with or relied upon the promises to support financially any concrete relief project except the money to be used to maintain the law firmness (company officers) who were located in Chicago, New York, and who have been previously referred to. The record disclosed, however, that the Chicago branch reportedly agreed that active steps be taken by the central council to transport businessmen to their homes, particularly those of them that had been located in

Lawrence and Tulsa.

To one theory of the opinion that complainants' position is untenable, and to one theory of no legal or equitable principle that suggests their contention that defendants were bound to respect the distinction of the central body, constituted as it was, and

deliver to it 75% of the money in their hands belonging to the Chicago branch, - the accumulation of sixteen or seventeen years of arduous endeavor, toil and sacrifice, - to do with as it willed.

As a result of a series of acrimonious communications between the central council and the Chicago branch, and because of expressed dissatisfaction with the central council's demands for money, its methods of doing business, and its failure to extend or afford relief to suffering Chunkoughans as anticipated and ordained by the convention of 1925, the Chicago branch at a meeting held January 22, 1928, resolved to withdraw from and sever its relations with the central council of the Reconstruction Union of Chunkough, and announced its action by publication of the following notice in the Armenian press:

"Call to all Men of Chunkough.

"During the period of last year and half, the activities of the Reconstruction Union of Chunkough has been harmful instead of beneficial for all the branches of this Union. Lately, there has been published a paper by the Tsovar association which represents itself as the server of the people's best interests. But its real purpose is to destroy our Union and have a hold on everything that our Union possesses. The authors of this movement are only few, who up to date, have not served our Union in any appreciable way.

"Therefore, this Branch in its meeting of January 22nd, Resolved to Sever its Relations with the Central Committee of the Reconstruction Union of Chunkough and to carry on its work separate as it has been done since 1918.

"Under these conditions, this Union considers its duty to invite other Branches and disinterested individuals to cooperate with each other to save the Union from this chaotic state, at the same time send financial help to starving people of Chunkough in France and Syria.

"(Signed) The Reconstruction Union of Chunkough

"Chicago Branch

"Secretary
"Markar Ermoian

Chairman
Bagdasar Keverkian"

That the central council failed to function and fulfill the aims and purposes of its establishment is evidenced by par. 13 of the minutes of the convention of the Reconstruction Union of Chunkough held at Lawrence, Mass., July 3 and 4, 1927, which read as follows:

"13. The enforcement of the decree of the previous convention.

"The meeting realizing that the main object of our Union is to transfer to Armenia the Armenians of Chunkush and that on account of various difficulties this aim has not been accomplished, resolved that the newly elected Central Committee should give effect to this object."

Subsequent to receipt of notice of its withdrawal the central council March 5, 1928, ordered the dissolution of the original Chicago branch, and authorized certain individuals who had theretofore been members to organize, with others, a new Chicago branch to supersede the original organization, and pursuant to such purported authority a meeting was held March 12, 1928, and officers elected. These officers peremptorily demanded that the officers of the original Chicago branch turn over to them its seal, records, effects and money. It appeared that some, at least, of the leaders and officers of the new Chicago branch had been in conflict with the administration of the original branch; one had been charged with converting organization funds to his own use; another with surreptitiously removing certain records and others with unbecoming conduct of various sorts. Thereafter the central council proclaimed the dissolution of the original Chicago branch by the following notice:

"To All Whom it May Concern:

"This is to certify that the Chicago Branch of the Chunkush Armenian Reconstruction Union of which Bagdasar Kevorkian, Markar Bnagan and Hagop Karikian are the officers, has been and is hereby dissolved under the power vested in us as Central Committee of said Union and the said three persons are no longer officers of the Chicago branch of our Union; and we state, moreover, that a new Chicago Branch has been formed and that Hachadour Boroyan, Chairman, Hordires Hagdelourian, Secretary and Hagop Israelian, Treasurer, are to form and are recognized by us as the Executive Committee of such Branch of Chicago, and that dues of members of said Chicago Branch will be paid into them and the seal of the Union should be delivered to the last named three officers duly authorized by us to represent the Chicago Branch.

"In Witness Whereof, we have hereunto set our hands this 5th day of April, 1928.

"S. Mathosian
"Chairman

A. Fabecjian,
Secretary."

The following is a list of the names of the persons who have been elected to the various offices of the National Council of the American Medical Association for the year 1911. The names are given in alphabetical order of the surnames.

The following is a list of the names of the persons who have been elected to the various offices of the National Council of the American Medical Association for the year 1911. The names are given in alphabetical order of the surnames.

This is to certify that the following persons have been elected to the various offices of the National Council of the American Medical Association for the year 1911. The names are given in alphabetical order of the surnames.

If the central council possessed the power to dissolve the Chicago branch and confiscate its funds, such power must appear in the provisions of the by-laws evidencing such authority as was granted to it by the local branches in the convention of 1925, when the by-laws were promulgated. The only by-law dealing with dissolution of a branch provides for same only in the event that the membership of the branch falls below five in number. That the central council had no power or authority to dissolve the Chicago branch, supplant it with a new branch, or demand that it turn over its money and effects to such new branch, is conclusively established by the record in this cause. Its attempt to supplant it and deprive it of its property, effects and money was, in our opinion, an idle gesture.

As heretofore stated, the central council was brought into being for the sole purpose of ascertaining worthy objects for the benefactions of the local branches and disbursing the collective contributions of those branches. It possessed no inherent powers over the branches, and such powers as were granted to it by them were solely for the accomplishment of the particular and specified objects of the society.

Its attempt to exercise the extraordinary power of insisting that 75% of the funds of the Chicago branch be turned over to it, generally and without any limitation or specification as to the use to which the money was to be put, has no justification on the record in this case on any theory or principle, either of law or equity; neither has its attempt to dissolve the original Chicago branch, and its further attempt to replace it with a new branch, and compel the transfer of all its money and effects to it.

A court of equity could not permit the officers of a voluntary organization, such as the central council has been

shown to be, to prevail on the character of claim set forth in the bill of complaint in this case. The failure of the central council to function as ordained, and its inordinate and unwarranted demands on the Chicago branch, furnished sufficient justification for its withdrawal. Its withdrawal did not and could not legally or equitably subject it to dissolution or liability under all the facts and circumstances in evidence.

In our opinion the chancellor was fully justified in sustaining the objections to the master's report and entering the decree dismissing the bill for want of equity.

For the reasons stated herein the decree of the Superior court is affirmed.

AFFIRMED.

Gridley and Seanlan, JJ., concur.

the fact that the Commission has not yet received any information from the State Department regarding the status of the investigation. The Commission is aware that the State Department is conducting a thorough investigation of the matter and is confident that the results will be made known to the Commission as soon as they are available.

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第 8 章 数据库系统

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O. A. CHRISTENSEN,
Complainant,

v.

RAY PETERS et al.,
Defendants.

AUGUST S. FRITZ,
Appellant,

v.

WALTER T. LARSON,
Appellee.

APPEAL FROM SUPERIOR

COURT, COOK COUNTY.

273 LA. 613

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Upon default in the payment of principal and interest the trustee under a trust deed executed in 1926 securing a bond issue of \$20,000, represented by 20 bonds of \$1000 each, filed a bill to foreclose the trust deed in behalf of all the bondholders. A decree of foreclosure and sale was entered finding that \$21,706.43 was due the bondholders for principal and interest and the sale of the premises ordered.

At the sale conducted by the master in chancery and at which the trustee made no bid, one August L. Fritz, a stranger to the foreclosure proceeding, bid \$4000 for the property and in the absence of other bids his was accepted by the master October 13, 1932, upon his payment of \$1000 cash and his promise to pay the balance of \$3000 upon confirmation of the sale by the court. October 20, 1932, the court entered an order confirming the sale and Fritz paid the balance of \$3000 to the master. Walter T. Larson, appellee, by leave of court filed his appearance on the same day

2022

G. A. DILLON, JR.,
Plaintiff,

v.

RAY BROWN, JR.,
Defendant.

JOHN W. DILLON,
Plaintiff,

v.

WILLIAM V. DILLON,
Defendant.

WILLIAM V. DILLON

JOHN W. DILLON

2731A.613

WILLIAM V. DILLON
Plaintiff
THE COURT OF THE STATE

Upon review of the payment of principal and interest
 the trustee under a trust deed executed in 1916 amounting to bond
 issue of \$20,000, represented by 20 bonds of \$1000 each, filed
 a bill to enforce the trust deed in default of all the bondholders.
 A decree of foreclosure was entered in 1921, and the sale of
 was the condition, for principal and interest and the sale of
 the proceeds thereof.

At the sale conducted by the master in 1921, and as
 when the trustee was at his, and James L. Dillon, a stranger to
 the foreclosure proceeding, bid \$1000 for the property and in the
 absence of other bids he was awarded by the master October 12,
 1921, when his payment of \$1000 was and his promise to pay the
 balance of \$1900 upon certification of the sale by the court.

October 24, 1921, the court entered an order confirming the sale and
 with said the balance of \$1900 to the master. Walter V. Dillon,
 appearing, by leave of court filed his appearance in the same day

and upon his petition and proper notice an order was entered by the court October 22, 1932, that vacated the order confirming the sale, set aside the sale and directed the master to re-advertise the property and sell the same again. No certificate of sale had been delivered to appellant by the master and no duplicate certificate was recorded. This appeal followed the entry of the above order.

The bill to foreclose filed December 11, 1931, by the trustee, alleged that it was brought by him as trustee for and in behalf of the holders of the bonds, and that the premises involved consisted of a modern two story brick building containing two five room and two four room apartments of the approximate value of \$17,000.

October 22, 1932, appellee filed his petition alleging that he was the legal holder of \$16,000 of the \$20,000 bond issue secured by the trust deed under foreclosure; that October 13, 1932, the premises in question were sold at the master's sale to one August S. Fritz who bid in the property for \$4000; that Fritz was a total stranger to and had no interest in the foreclosure proceeding, and that his bid of \$4000, after payment of the costs and expenses of the foreclosure, would pay to the bondholders approximately only eight cents on the dollar; that that sum was grossly inadequate and would result in almost a complete loss of his investment; that a better bid would be made in the event the sale of October 13, 1932, was set aside by the court, and prayed the court to vacate the order of October 20, 1932, confirming the sale, to set aside the sale and direct the master to re-advertise the property and sell it again.

Appeller paid the costs of the original sale and tendered to the master his bonds of \$16,000 to guarantee a bid of \$15,000,

which he undertook to make at the subsequent sale. The master tendered back to appellant the \$4000 received from him as payment for the property as a result of the sale of October 13, 1932, but he refused to accept it.

Upon the master's second sale of the property November 23, 1932, the bid of \$15,000 of appellee was accepted and the property sold to him. Fritz, through his attorney, attended the second sale and again bid \$4000. Upon the master's report the second sale was confirmed by an order entered by the court December 7, 1932, without objection on the part of appellant.

Appellant contends that after bidding \$4000 at the original master's sale of the property in question, and after a report of the sale reciting his payment of \$1000 cash and his ability to pay the remaining \$3000, upon confirmation of the sale by the court, and after the approval of the master's report of the sale by the court and payment of the entire purchase price, he was the owner of the property subject only to the contingency of redemption within the statutory period of fifteen months, and that the chancellor did not have the power to take the property away from him by the order of October 22, 1932. Appellee insists that the order of the chancellor was both proper and justifiable under all the circumstances and equities of the case.

Appellee was not made a party to the bill to foreclose and had no notice or knowledge of the master's sale of October 13, 1932, at which appellant bid in the property. Although the decree of sale provided that the outstanding bonds and interest coupons might be used in payment of any bid that might be made, except as to the costs and expenses of the proceeding, the trustee did not

which is subject to the approval of the court. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law.

Upon the court's order, the sale of the property was set aside. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law.

original owner's sale of the property in question, and after a report of the sale to the court, the court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law.

order of the court, the court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law.

in the case and judgment of the court, the court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law. The court has the right to set aside the sale if it is found to be fraudulent or if the sale is not in accordance with the law.

appear or bid at that sale to protect the interests of the bondholders in whose behalf he filed the bill to foreclose nor did he advise appellee that the sale was to take place.

Many cases have been cited that confirm the right and power of the chancellor to set aside a master's sale of property under foreclosure because of inadequacy of price coupled with fraud, accident, mistake or unfairness. In the instant case it is true that the chancellor entered an order October 20, 1932, approving the sale of October 13, 1932. It is also true that when the sale was approved the court was not apprised of the sheer inadequacy of the amount bid; that it would afford the holders of the \$20,000 worth of bonds approximately only eight cents on the dollar; that the trustee did not appear at the sale to protect the interests of the bondholders; that appellee, who was the owner of \$16,000 of the bonds did not have either notice or knowledge of the sale, or that a bid nearly four times as large was available. There can be no question that if the chancellor's attention was directed to these facts, and the further facts that in addition to the \$20,000 incumbrance on the premises there was a junior incumbrance of \$14,200 of record, and that the trustee alleged in his bill of complaint that the property was reasonably worth \$17,000 he would have withheld his approval of the sale of the property by the master for \$4000.

This appeal presents for our determination the question as to whether or not the chancellor may in term time vacate an order confirming a master's sale. As far as we have been advised or been able to learn after diligent search this precise question has not been presented to or passed upon by the courts of review of this state. Many cases have been cited holding that it was not only the right but that it was the duty of the court to set aside a sale prior

to its confirmation where in addition to inadequacy of price the sale was shown to possess any element of unfairness. We perceive no reason why the same rule should not apply, even if such sale had been confirmed, if the motion to vacate the order of confirmation was made within term time.

We are not familiar with any rule of law or equity that precluded a chancellor two days after the entry of an order approving a sale and during the term of its entry from setting aside an inequitable sale. If the facts presented in the petition of appellee to vacate the order confirming the sale had been before the court when the master's report of the original sale had been presented for approval they would have necessarily influenced the court to withhold confirmation. In Bartak v. Invalt, 261 Ill. 279, where the chancellor refused to consider affidavits that had been presented in support of a motion made during the same term to vacate a decree, the Supreme court said, p. 283:

"The fact that they were not presented until after the entry of the decree can make no difference. It was during the same term of court, and although the decree had been signed by the judge a few days before, it was nevertheless ambulatory until the final adjournment of the term and subject to revision and modification in furtherance of the ends of justice."

So with this order. During the term the court retained jurisdiction to revise, modify or vacate it in furtherance of the ends of justice.

No absolute right or interest in the property was vested in appellant by the order of October 20, 1932. A court of equity will not, if it is within its power to prevent it, permit a holder of \$16,000 worth of bonds secured by real estate to be divested and deprived of his security by a sale of property that is palpably unfair and at a price that is grossly inadequate.

In view of what has been heretofore stated we are of the opinion that the same power was inherent in the chancellor during the term to set aside and disapprove the sale after the order of

to its jurisdiction in relation to the property of which the
title was shown in process of acquisition. The jurisdiction
is shown by the fact that the title was shown in process of
acquisition, in the relation to which the order of acquisition
upon the same title was shown.

It was not found that any title of law or equity that
precluded a chancellor and a vice-chancellor from acting in
the same and during the term of the equity from acting in the
same. It was found that the title was shown in the relation of acquisition
to which the order relating the title and vice before the court
upon the matter's title of the original title had been presented
for approval they would have necessarily indicated the same to
the court. In Barber v. Taylor, 101 Ill. 279, where
the chancellor refused to vacate a judgment that had been presented
in support of a motion made during the term to vacate a decree,
the court was said, p. 281:

"The fact that they were not presented until after the
entry of the decree was not material. It was during the
same term of court, and although the decree had been signed by
the judge in the term before, it was a necessary consequence until
the final judgment of the court was subject to revision and
modification in the term of the court of justice."

As with this matter, during the term the court retained jurisdiction
to review, modify or vacate it in the term of the court of justice,
to vacate, modify or amend in the property was vacated

in accordance with the order of October 20, 1892, a court of equity
will not, it is within the power to prevent it, permit a holder
of \$10,000 worth of bonds secured by real estate to be divested and
deprived of his security by a sale of property that is primarily un-
der a lien of a prior lien in equity jurisdiction.

It was found that the vice-chancellor stated to one of the
opinion that the same power was inherent in the chancellor during
the term to set aside and disapprove the sale after the order of

confirmation as he possessed prior thereto. While mere inadequacy of price has been held not to be sufficient justification for withholding confirmation of a judicial sale, a price of \$4000 for the property involved is so inadequate as to shock the conscience of the court and to amount to sufficient evidence of fraud in law to warrant the court in setting aside the same for mere inadequacy of price. Where as in this case the property is valuable and the loss to the bondholders would amount to many thousands of dollars, every circumstance connected with the sale should be scrutinized closely and the slightest irregularity should be considered sufficient to order a resale. (Rader v. Bussey, 313 Ill. 226.) While no absolute fraud is disclosed by the record the entire transaction is shrouded with suspicion, and the original sale undoubtedly impressed the chancellor, as it does us, as being unconscionable.

Appellee contends, and we agree with him, that under all the circumstances the bid of appellant was so grossly inadequate as to constitute a legal fraud upon the bondholders, and the chancellor was fully justified in ordering a resale of the property. In determining a somewhat similar question in Noeller v. Miller, 315 Ill. 454, the court said, pp. 459, 460:

"The chancellor has a broad discretion in the matter of approving or disapproving a sale made by the master in chancery where there is no right of redemption from the sale and where the deed is by the terms of the sale not to be made by the master to the purchaser until after confirmation of the sale by the court. Where the sale has been conducted in accordance with the order of the court and the purchaser is a stranger to the order of sale, as in this case, mere inadequacy of price will not justify a court in not confirming the sale and depriving the purchaser of the benefits of his bargain unless the inadequacy is such as to amount to fraud. Where inadequacy of price is relied upon as a ground for disturbing the sale, and the claim is that the price is so inadequate as to amount to fraud, there must exist the further fact that there is no right of redemption from the sale. (Skakel v. Cycle Trade Publishing Co., 237 Ill. 482; Rader v. Bussey, 313 id. 226.) In this case there is no right of redemption from the sale, as the fifteen months' period given by the statute for redemption had expired before sale. In the case of Rader v. Bussey, just cited, the rule

is laid down that where the bid at a judicial sale is so inadequate as to shock the conscience of the court or to amount to sufficient evidence of fraud in law the sale will be set aside on that ground, alone. In determining this question no definite rule is laid down as to what per cent of the value of the property must be bid at the sale in order to amount to such gross inadequacy as to be evidence of a legal fraud but each case must be determined by its own circumstances. * * *

"The rule has often been announced that if in addition to the inadequacy of price there be any appearance of unfairness, or any circumstance, accident or occurrence in relation to the sale of a character tending to cause such inadequacy, then the sale will be set aside. (Rorer on Judicial Sales, p. 234.) * * * She not only received no notice from the solicitor but received no notice from any source, as the record shows. This circumstance, coupled with the gross inadequacy of price, clearly entitled her to the right to have the sale set aside."

This foreclosure was tinged with suspicion from its very inception. Although the bondholders were not more than five in number they were not made parties to the proceeding, and the trustee not only did not notify the bondholders of the sale nor bid himself nor secure other bidders to offer the fair market value of the property, but he actually permitted the court to confirm the sale when a word from him would have compelled its disapproval. Appellee, as soon as he ascertained the facts, presented them to the court and the court immediately, as was its duty, vacated the order.

Appellant, through his counsel, participated in the resale of the property ordered by the court by again bidding \$4000, and although he had been permitted to file his appearance in the cause, he entered no objection to the order of confirmation of the subsequent sale of the property for \$15,000. In view of his participation in the resale the question of waiver of any right that he may have had to appeal from the order of October 22, 1932, is presented and we seriously doubt his right to prosecute this appeal. However, in the view that we take of the merits and equities of the cause, it is unnecessary to decide that question.

For the reasons indicated the order of the Superior court of October 22, 1932, is affirmed.

Gridley and Scanlan, JJ., concur.

AFFIRMED.

36645

CARMELA STAFFA, administratrix
of the estate of John Sposato,
deceased,

Appellant,

v.

JEROME FISHER,

Appellee.

APPEAL FROM SUPERIOR
COURT, COOK COUNTY.

273 I.A. 613⁵

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This was an action on the case in the Superior court brought by plaintiff, Carmela Staffa, administratrix of the estate of John Sposato, deceased, under the Injuries Act to recover damages for the alleged wrongful death of Sposato.

March 19, 1932, plaintiff filed a declaration in which Barnett Fisher and Jerome Fisher were named defendants. It alleged that the death of plaintiff's intestate was the result of an automobile accident which occurred September 9, 1931. On motion of plaintiff the suit was dismissed January 2, 1933, as to Barnett Fisher. Thereafter on February 3, 1933, an amended declaration was filed naming Jerome Fisher as the sole defendant. He filed a plea of the general issue and a plea of the Statute of Limitations. Plaintiff filed a demurrer to the special plea which was overruled. She elected to stand on her demurrer and judgment was entered against plaintiff for costs. This appeal seeks to reverse the judgment.

Plaintiff contends that the original declaration stated a cause of action against Jerome Fisher as well as against Barnett Fisher; that the amended declaration filed more than one year after

100-43

CARROLL, JAMES, ADMINISTRATOR
of the estate of John Carroll,
deceased,

Applicant,

v.

JAMES W. CARROLL,

Appellee.

IN SENATE

COMMITTEE ON JUDICIARY

S. 31. A. 613

MR. CARROLL, SENATOR, I HAVE THE HONOR TO
ACKNOWLEDGE THE RECEIPT OF THE COPY.

This was an action to recover the value of the
property of the estate of John Carroll, deceased,
of the estate of John Carroll, deceased, under the
provisions of the will of John Carroll, deceased,
damages for the alleged tortious death of John Carroll.

On March 19, 1932, Plaintiff filed a declaration in which
James W. Carroll and James W. Carroll were named defendants. It alleged
that the estate of Plaintiff's father was the result of an error
of the court which occurred on September 6, 1931. On motion of
Plaintiff the suit was dismissed January 21, 1932, as to Plaintiff
James W. Carroll on February 21, 1932, on amended declaration
and filed against James W. Carroll as the sole defendant. It filed a
plea of the general issue and a plea of the statute of limitations.
Plaintiff filed a counterclaim to the general plea which was overruled.
The counterclaim is based on the fact that Plaintiff was injured
against Plaintiff for costs. This appeal seeks to reverse the
judgment.

Plaintiff contends that the original declaration stated
a cause of action against James W. Carroll as well as against James
W. Carroll; that the amended declaration filed with this court after

the death of plaintiff's intestate did not state a new cause of action but was a restatement of the cause of action contained in the original declaration; that, since the original declaration was filed within one year of the death of plaintiff's intestate, plaintiff has complied with the statute limiting the time within which such an action may be brought; and that, even if the original declaration did not state a cause of action against Jerome Fisher, sec. 39 of the Practice Act authorized the filing of the amended declaration stating a new cause of action after the expiration of the one year limitation.

Defendant's theory is that the original declaration stated a cause of action against Barnett Fisher only and did not state a cause of action against the defendant, Jerome Fisher; that the amended declaration states a new cause of action, and inasmuch as it was not filed within one year from the death of plaintiff's intestate plaintiff is barred from her action.

An inspection of the declaration is necessary to determine whether the original declaration stated a cause of action against Jerome Fisher. It contained five counts and the pertinent portions of count one, which is typical of all the counts, are as follows:

"Carmela Staffa, Administratrix of the Estate of John Spicato, deceased, plaintiff, by Harry A. Silverstein, her attorney, complains of Barnett Fisher and Jerome Fisher, defendants, in a plea of trespass on the case. * * *

"Plaintiff further alleges that on to wit, September 9th, A. D. 1931, the said defendant, Barnett Fisher, was then and there the owner of a certain motor vehicle which was then and there in the possession of and being driven, managed and operated by Jerome Fisher, the agent and servant of said Barnett Fisher, duly authorized in that behalf, upon and along said public highway known as Harrison Street in an easterly direction at or about the said intersection of Keeler Avenue.

"And plaintiff avers that it then and there became and was the duty of the defendant, by his agent and servant in that behalf, to drive, manage and operate said automobile in such a manner as not to injure plaintiff's intestate who was then and there lawfully upon said highway, as aforesaid, yet said defendant, by his agent and servant, in that behalf; wholly regardless of the duty of said defendant, as aforesaid,

then and there so carelessly, negligently and improperly drove the said automobile easterly upon said Harrison Street, as aforesaid, that as a direct and proximate result of said improper conduct, carelessness and negligence, the defendant, by his said agent and servant aforesaid, ran into, upon and over the plaintiff's intestate with said automobile; that as a result thereof the plaintiff's intestate was then and there thrown violently to and upon the pavement of said highway, by means whereof the plaintiff's intestate received personal injuries which thereafter, on to wit, September 9th, A. D. 1931, resulted in and caused his death."

It will be noted that while Jerome Fisher is named as a defendant in the formal commencement of the declaration no attempt is made in the charging portion of same to state a cause of action against him. It is uniformly held that in a case of this character it is essential to charge the existence of a duty on the part of defendant to protect plaintiff from the injury complained of; the failure of defendant to perform that duty and that injury to plaintiff resulted from such failure. The original declaration is absolutely silent in so far as any allegations of these necessary elements of a cause of action against Jerome Fisher are concerned.

The law is well settled that where a declaration asserts a cause of action imperfectly, or where it is merely defective as to some matter of pleading, an amended declaration may be filed after the expiration of the limitation period and the right to maintain the action will not be barred.

No case has been cited, and we have found none, that holds that where no cause of action against a defendant is alleged in the original declaration, an amended declaration which necessarily states a new cause of action, - one which had not been stated before, - may be filed after the limitation period without being obnoxious to a plea of the Statute of Limitations.

The rule is clearly and correctly stated in Hylenfeldt

v. Illinois Steel Co., 165 Ill. 185, where the court said, p.

189:

"The question then presented by the record before us is, whether the counts filed by the plaintiff in January, 1895, after the two years provided by the statute for bringing an action had expired, set up a new cause of action, or whether they were a mere restatement of the cause of action already stated in the declaration. Upon an inspection of the declaration first filed by the plaintiff it will be found that the commencement of the declaration is in proper form in an action of trespass on the case, and no fault is found with the conclusion of the declaration, wherein damages are claimed; but when the body of the declaration is examined, where the cause of action should be set up, no cause of action whatever is averred in the declaration. The amended count does, however, set up a cause of action, but, inasmuch as the original declaration stated no cause of action, it seems to follow that the amended declaration stated a new cause of action, - one which had never been stated before, - and hence the Statute of Limitations was a good defense. There could be no restatement of a cause of action by the amended declaration unless the cause of action had been stated before. If the plaintiff had stated his cause of action in a defective manner, omitting some feature which should have been incorporated in it, then an amendment restating the cause of action would not fall within the statute. But such was not the case."

The original declaration in the instant case did not even pretend to state a cause of action against Jerome Fisher but plaintiff insists that even if it did not sec. 39 of the Practice act sanctioned the filing of an amended declaration that necessarily stated a new cause of action, after the limitation period had run, and cites Zister v. Pollack, 262 Ill. App. 170, as decisive of her contention. Sec. 39 of chap. 110, Cahill's 1931 Revised Statutes of Illinois, provides:

"At any time before final judgment in a civil suit, amendments may be allowed on such terms as are just and reasonable, introducing any party necessary to be joined as plaintiff or defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of action, and in any matter either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense. The adjudication of the court allowing an amendment shall be conclusive evidence of the identity of the action.

"Any amendment to any pleading shall be held to relate back to the date of filing the original pleading so amended, and the cause of action or defense set up in the amended pleading shall not be barred by laches, or lapse of time under any statute prescribing or limiting the time within which an action may be brought or right asserted, if the time prescribed or limited had

not expired when the original pleading was filed, and if it shall appear from the original and amended pleadings that the cause of action asserted, or the defense interposed in the amended pleading grew out of the same transaction or occurrence, and is substantially the same as set up in the original pleading, even though the original pleading was defective in that it failed to allege the performance of some act or the existence of some fact, or some other matter or matters, which are necessary conditions precedent to the right of recovery or defense asserted when such conditions precedent have been in fact performed."

A careful reading and analysis of this statute permitting amendments to pleadings emphasizes the fact that it presupposes the filing of a declaration setting forth a good cause of action in the first instance. The above section clearly and specifically states that "any amendment to a pleading shall be held to relate back to the date of filing the original pleading * * * and * * * shall not be barred by laches or lapse of time under any statute prescribing or limiting the time within which an action may be brought * * * if the time prescribed or limited had not expired when the original pleading was filed * * * and if * * * the cause of action asserted * * * is substantially the same as set up in the original pleading."

In the case at bar the amended declaration stated a good cause of action which could not possibly be substantially the same as that set up in the original declaration which, we have heretofore pointed out, neither stated nor attempted to state a cause of action, good or otherwise, against Jerome Fisher, and, therefore, this section of the Practice act is not applicable to the question presented by this appeal.

We are in full accord with the conclusion reached by the learned judges of the first division of this court in their opinion in the Wister case, supra. However, in that case, which was also brought under the wrongful death statute, a cause of action was stated in the original declaration and the amended declaration filed after the limitation period had run simply supplied the date

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to the question of the responsibility of the individual in the case of a crime, the Commission has been asked to consider the possibility of a "guilty by reason of insanity" defense. The Commission has concluded that such a defense is not appropriate in the case of a crime committed by a person who is sane at the time of the act. The Commission has also concluded that the responsibility of the individual is not affected by the fact that the act was committed in the presence of a crowd or in a public place. The Commission has further concluded that the responsibility of the individual is not affected by the fact that the act was committed in the presence of a crowd or in a public place. The Commission has also concluded that the responsibility of the individual is not affected by the fact that the act was committed in the presence of a crowd or in a public place.

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of the death of plaintiff's intestate. Sec. 39 was applicable to the situation there presented and was complete authority for the holding of the court.

We are of the opinion that there is neither force nor merit to plaintiff's contentions and that the trial court was justified in overruling the demurrer to defendant's plea of the Statute of Limitations.

For the reasons indicated the judgment of the Superior court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

of the issue of citizenship, but it is not possible
to the citizens of the United States and the citizens of the
for the United States of America.
The act of the opinion that there is no other law but
to the citizens of the United States and the citizens of the
justified in exercising the power of the government of the
United States of America.
For the reasons indicated the judgment of the majority
court is affirmed.

affirmed.

Orlitz and Justice, 11:1, 1900.

36719

VIRGINIA ANN CONOVER,
Appellee,

v.

CLARA K. MICHELSON,
Appellant.

3 / A
APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

273 I.A. 614¹

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

This appeal seeks to reverse a judgment for \$2750 entered in favor of plaintiff, Virginia Ann Conover, against Clara K. Michelson for personal injuries resulting from a collision between defendant's Pierce Arrow automobile, in which plaintiff was riding as a guest, and the Ford car of one Bryant at the intersection of Washington boulevard and Bellwood avenue, in the village of Bellwood. The jury's verdict assessed the damages at \$3000, but plaintiff consented to a remittitur of \$250 and judgment was entered for the balance.

The declaration alleged due care on the part of plaintiff, that defendant was negligent in the operation of her car and that she negligently, improperly and in violation of the right of way statute drove across the street intersection when a car approaching from the right had the right of way.

Defendant's theory is that she acted reasonably under the circumstances, that plaintiff was not in the exercise of due care, and contends that the court erred in giving certain instructions requested by plaintiff to the jury, and in refusing to give other instructions requested by defendant, in admitting certain evidence and in allowing plaintiff's attorney too great latitude in his argument to the jury. Defendant also contends that the damages

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allowed are excessive.

Plaintiff's theory is that defendant was negligent in driving her car across Washington boulevard, notwithstanding that she had been warned of the approach of the other car from her right in time to have stopped before reaching the point of collision, and that instead of stopping her car she accelerated its speed and attempted to pass in front of the other car which clearly had the right of way under all the facts and circumstances appearing in the evidence; that plaintiff had nothing to do with the operation of the automobile and that when she saw the other automobile approaching from the right on Washington boulevard she immediately shouted a warning to defendant while the other car was still at such a distance from the intersection that defendant could have stopped her car before reaching same.

There is very little controversy on the facts. The undisputed evidence discloses that plaintiff was fifteen years old at the time of the accident; that defendant was driving her car containing her daughter, plaintiff and plaintiff's mother home from a children's party about 2 a. m. on the morning of August 9, 1930; that she was looking for Mannheim road and had lost her way and finally had turned into Bellwood avenue, several blocks south of Washington boulevard, without knowing what road she was traveling on or in which direction she was going; that as she proceeded on Bellwood avenue she and her passengers were looking for street or road signs in an endeavor to ascertain their whereabouts and to find the proper route to their homes on the north side of the city of Chicago; that plaintiff's mother was seated to the right of defendant on the front seat, plaintiff was on the left side of the rear seat and defendant's daughter on the right side of the rear seat of the car which was a two door brougham; that the car

allowed the evidence.

Plaintiff's theory is that defendant was negligent in driving her car across defendant's driveway, notwithstanding the fact that she was the owner of the car. The fact that she had been warned of the approach of the other car from the right in time to have stopped is not material to the point of collision, and that instead of stopping her car she continued its speed and attempted to pass in front of the other car which clearly had the right of way under all the facts and circumstances appearing in the evidence; that plaintiff was negligent in the operation of the automobile and that when she saw the other automobile approaching from the right on a highway boulevard she immediately crossed a driveway to defendant while the other car was still at such a distance from the intersection that defendant could have stopped her car before reaching same.

There is very little controversy on the facts. The undisputed evidence disclosed that plaintiff was fifteen years old at the time of the accident; that defendant was driving her car containing her daughter, plaintiff and plaintiff's mother home from a children's party about 8 p. m. on the morning of August 2, 1934; that she was looking for defendant's road and had her car and finally her car turned into defendant's driveway, several blocks south of defendant's driveway, without stopping. That road she was traveling on or in which direction she was going; that as she proceeded on defendant's driveway she and her passengers were looking for a house or road signs in an endeavor to ascertain their whereabouts and so find the proper route to their home on the south side of the city of Chicago; that plaintiff's mother was seated on the right of defendant on the front seat, plaintiff was on the left side of the rear seat and defendant's daughter on the right side of the rear seat of the car which was a two door touring; that the car

was being driven north on Bellwood avenue at a speed of between 20 and 25 miles an hour until the girls in the rear seat shouted "car," "look out," "lights" or "duck;" that the warning outcries were made by them when they saw, almost simultaneously, the lights of a car approaching Bellwood avenue on Washington boulevard from the east and to their right; that defendant heard the exclamations of the girls and saw the lights of the other car; that she made no effort to stop or turn her car to the right or left but instantly accelerated its speed and proceeded into and across the intersection and the cars collided on the north half of Washington boulevard at its intersection with Bellwood avenue; that although she applied her brakes sometime after the impact, and both foot and emergency brakes were found locked immediately after the collision, her car continued in a northwesterly direction on Bellwood avenue over the 8 inch west curb, over the higher parkway, scraping the bark off a tree, and over the still higher sidewalk, and ran into and across the uneven vacant lot on the northwest corner, over rubbish and stumps, a distance of at least 60 feet, and that it traveled a distance of at least 90 feet from the point of the impact; that she was driving on the east side of Bellwood avenue, which runs north and south and is 36 feet wide; that both streets were well paved and Washington boulevard, which runs east and west, was 60 or 70 feet wide with a concrete roadway 20 feet wide in the center; that defendant's car, including its brakes, was in good mechanical condition, both highways were dry and she could stop her car under the existing conditions going 20 miles an hour within 20 feet; and that it was a clear night with the moon shining brightly.

Bryant, the driver of the other car, testified that he was traveling west on Washington boulevard on the north side of the pavement on his way to work at a speed of between 20 and 25 miles an hour; that at the time of the impact defendant's car was

was being driven north on Ballou Street at a speed of between 20 and 25 miles an hour until the light in the rear was changed from red to green, at which time the witness in the car was made by them when they saw, almost simultaneously, the lights of a car approaching Ballou Street on Washington Boulevard from the east and to their right; that defendant drove the car westward of the light and was the light of the other car; that he made no effort to stop or turn her car to the right or left but immediately accelerated the speed and proceeded in a line across the intersection and the cars collided on the north half of Washington Boulevard at the intersection with Ballou Street; that although the collision was a head-on collision after the impact, and both cars were thrown forward, yet both cars immediately after the collision, were not continued in a northwesterly direction on Ballou Street over the 20 foot west curb, over the highway, retaining the back of a tree, and over the still higher sidewalk, and ran into and across the highway and into the southeast corner, over railing and awnings, a distance of at least 50 feet, and that it traveled a distance of at least 50 feet from the point of the impact; that the car coming on the east side of Ballou Street, which runs north and south and is 20 feet wide; that both cars were well over and Washington Boulevard, which runs east and west, was 20 or 25 feet wide with a concrete roadway on the east side in the center; that defendant's car, including the body, was in good mechanical condition, both before and after the collision, and the car was not under the existing conditions when it was driven on Ballou Street; and that it was a clear night with no moon and no lights.

Defendant, the driver of the other car, testified that he was traveling west on Washington Boulevard on the north side of the roadway on his way to work at a speed of between 20 and 25 miles an hour; that at the time of the impact defendant's car was

going 50 to 55 miles an hour; that her bright lights were not turned on; that she gave no signal of her approach; that he did not see defendant's car until it was only a short distance from him; that he immediately turned his front wheels toward the north; that the front ends of the cars met or side swiped each other; and that he brought his car to a stop about 10 feet to the right on Bellwood avenue with his right front wheel against the east curb.

Defendant testified that she was an experienced driver and had been driving various makes of cars for twenty two years, and that when she heard the warning cries of the girls and saw the headlights of Bryant's car on Washington boulevard, approaching the intersection from the east, her car was 25 or 30 feet south of the south line of the 20 foot paved roadway of that street. Plaintiff and her mother testified that when the girls gave defendant warning her car was about 40 or 50 feet from the south line of Washington boulevard proper, or about 75 or 80 feet from the northeast quarter of the paved intersection where the accident occurred.

Plaintiff testified that defendant's car was going very fast at the time of the impact and her mother testified that defendant was driving 40 or 45 miles an hour at the time the cars collided; that she did not have her bright lights on, and that she did not sound the horn as she approached the intersection.

No witness testified as to the speed of the Bryant car except the driver of that car, and the only witness who testified as to the distance of his car from the intersection was plaintiff, who at one time stated that at the time she first saw the lights of his car approaching the intersection on Washington boulevard it was farther away from the intersection than defendant's car and again she stated that it was closer.

It appeared there was a sign which read "Stop Chicago Motor Club" on the east side of Bellwood avenue south of the south

sidewalk line of Washington boulevard but that it was unlighted, and that neither defendant or any of her passengers saw the stop sign prior to the collision. Bryant testified that he passed over the intersection several times daily and that he knew there were stop signs on Bellwood avenue, both to the north and south of Washington boulevard. It is not contended there was any ordinance authorizing the erection of the stop sign or requiring a stop on approaching Washington boulevard.

The glass on the right side of defendant's car was broken and plaintiff's face was cut. The wound, which was "U" shaped, began just below the angle of the mouth on the right side, going into the upper lip slightly, curved down around the chin to the jaw bone and then upward to the center of the right cheek. She was taken to a hospital where it was stitched and where she remained about a week. Later she went to a sanitarium for about ten days and about four months later an operation which required cutting into the scar one quarter of an inch over its entire course and thirty sutures was performed to remove undesirable scar tissue in an endeavor to improve the appearance of the scar left by the wound. The affected part healed rapidly, filling up again with a superabundant growth of repair tissue and leaving a permanent extensive horseshoe scar on her right chin and cheek.

Plaintiff testified as to her nervous condition and the pain she suffered from the date of her injury and it was stipulated that \$750.25 was a fair and reasonable charge for the hospital, medical and surgical services rendered her.

We know of no theory under which defendant could escape liability in this case. Plaintiff, a guest in the car, who sat in the rear seat and had nothing to do with its operation warned defendant of the approach of the other car in sufficient time for

[illegible]

her to have stopped or turned her car and avoided the collision. She therefore cannot be charged with contributory negligence. Defendant on her own evidence, interpreting it as favorably as possible in her behalf, was clearly guilty of the negligence which resulted in the injury to plaintiff. Disregarding the warning of plaintiff, and her own daughter, of the imminent approach of the other car on Washington boulevard to her right, and disregarding the right of way rule which she testified she was familiar with, and without any showing that, although she was approaching the intersection from the left, she had the right of way, because of the respective distances of the two cars from the intersection and the respective speeds at which they were traveling, defendant put her foot on the gas and accelerated the speed of the car so that at the time she drove into and across the intersection she was traveling at a high, dangerous and excessive rate of speed. The speed of her car was clearly shown by the testimony of the witnesses and the fact that after the impact her car traveled more than 90 feet over an 8 inch curb, a higher parkway and a still higher sidewalk, colliding with a tree and into the uneven vacant lot over stumps and piles of rubbish.

The evidence as to the speed of Bryant's car, the distance of the respective cars from the intersection when defendant first saw the other car, the fact that the other car was approaching from the right and all the facts and circumstances appearing in evidence, confirm the superior right of way of his car at the intersection.

Defendant's liability was conclusively established, and where it is apparent that the jury has not been misled and the verdict is substantially correct and speaks the truth, this court will not consider imperfections in the instructions or errors of

has to have stopped or turned it off and avoided the collision. The defendant would be charged with a conspiracy to commit a crime. Defendant on her own admission, testifying, it is her belief as possible in her belief, was a very likely of the negligence which resulted in the injury to plaintiff. Disregarding the warning of plaintiff, and not the defendant of the defendant, approach of the other car in defendant's belief to her right, and disregarding the fact of any other which she recalled the was familiar with and without any showing that, although the was approaching the intersection from the left, she had the right of way, because of the respective positions of the two cars from the intersection and the respective spaces at which they were traveling, defendant has her feet on the gas and accelerated the speed of the car so that at the time the two cars met and crossed the intersection he was traveling at a high, dangerous and excessive rate of speed. The speed of her car was clearly shown by the testimony of the witnesses and the fact that after the impact her car traveled more than 50 feet over an 8 inch curb, a slight bumping and a still higher obstacle, collision with a tree and into the runway and on over a ditch and pile of rubbish.

The evidence as to the speed of plaintiff's car, the distance of the respective cars from the intersection when defendant first saw the other car, the fact that the other car was approaching from the right and all the facts and circumstances appearing in evidence, entitle the expert right of way of his car at the intersection.

Defendant's liability was conclusively established, and there is no argument that the jury has not been misled and the verdict is substantially correct and upholds the truth, this court will not consider impugning in the instructions or errors of

the trial court in the admission of evidence as sufficient ground for reversal of a judgment of the trial court. Technical objections, which do not go to the actual right of plaintiff to recover, will be disregarded where substantial justice has been done between the parties.

In passing upon this question in Grienke v. Chicago City Ry. Co., 234 Ill. 364, 574, the Supreme court quotes with approval from West Chicago Street Railroad Co. v. Maday, 188 Ill. 308, 310, where it said:

"When the court can see from the record that an error committed by the trial court in the progress of the case was a harmless one, or that its injurious effect or harmful character was obviated, so as not to affect injuriously, in the final judgment, the rights of the party against whom the error was committed, it should not be allowed to work a reversal. It is more important in the administration of justice that litigation should end in the attainment of substantial justice than that a record of the proceedings should be built up which is without flaw or blemish."

It is inconceivable in this cause, even had the trial judge refused or modified plaintiff's given instructions to meet defendant's objections and had admitted none of the alleged incompetent evidence defendant complains of, that any different result could have been arrived at by the jury. The judgment will not be reversed for errors in the instructions to the jury or admission of evidence where the jury could have rendered no other verdict consistent with the evidence in the case.

In Fuzessery v. American Benefit Cas. Ins. Co., 256 Ill. App. 476, the court said, p. 480:

"Our courts have repeatedly held that the Appellate Courts will not reverse a judgment for errors in the instructions to the jury or admission of evidence where, under the evidence, the jury could have rendered no other verdict consistent with the evidence in the case. (White v. Holden, 206 Ill. App. 567; Vinson v. Scott, 198 Ill. 542; Jackson v. People, 126 Ill. 139; Egan v. Donnelly, 71 Ill. 100.)"

Defendant strenuously insists that the court erred in admitting evidence as to the presence and location of the "Stop" sign because it was not shown to have been authorized by ordinance.

The delay in the trial of the case is not a sufficient ground for reversal. It is the duty of the court to see that the trial is held as soon as possible, and it is not the duty of the court to see that the trial is held at a particular time. The court is not to be concerned with the delay in the trial of the case, but with the delay in the trial of the case.

It is not the duty of the court to see that the trial is held at a particular time. The court is not to be concerned with the delay in the trial of the case, but with the delay in the trial of the case. The court is not to be concerned with the delay in the trial of the case, but with the delay in the trial of the case.

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In our opinion there is no force to this contention. It has been held by this court that even in the absence of an ordinance authorizing the erection of such signs their presence and location may be shown as part of the general surroundings. Authorized or unauthorized by ordinance motorists are bound to heed such signs. Their mere presence is an indication that they have at least been permitted and countenanced by the authorities. In fact, the erection of such signs by motor clubs at dangerous crossings throughout this and other states has been encouraged. While this evidence was admissible, there was further evidence that the "Stop" sign on the east side of Bellwood avenue south of Washington boulevard was unlighted at the time defendant approached and passed it and that neither she nor any of her passengers saw it. Defendant was driving her car; it was a clear moonlight night and there were no obstacles in front of the sign. Whether under all of the facts and circumstances in evidence she could have seen the sign in the exercise of ordinary care was a question of fact for the jury. However, it is clear that her failure to see the sign and observe its warning was not a determining factor in this case. She received an even more poignant warning from the girls in the rear seat and totally ignored and disregarded it. We are convinced from a careful examination of all of the evidence in the record that the heedless and reckless driving of defendant's car across the intersection at a high and dangerous rate of speed after she saw the other car and in violation of the right of way statute determined the verdict of the jury.

Defendant contends that the damages were excessive and particularly urges that the court erred in giving instruction No. 6 requested by plaintiff, which is as follows:

"If you find for the plaintiff you will be required to determine the amount of her damage.

"In determining the amount of damages the plaintiff is

In our opinion there is no issue in this case. It is not
held by this court that even in the absence of an admission
substantiating the location of each party's presence and location
may be shown as a matter of course. Substantial evidence
established by evidence not only tends to show each element
that was present in the instant case but also has been
permitted and corroborated by the evidence. In fact, the
evidence of each side by each side is substantial and
substantiating this and other facts has been substantiated. Also this
evidence was substantiated, there was further evidence that the
sign in the rear of the vehicle was not at the location
but was not at the time of the accident and was not
it and that neither the nor any of the witnesses saw it. In fact
and on this fact it was a clear violation of the law and there
were no facts in front of the sign. In fact, under all of the
facts and circumstances in evidence the facts have been the sign
in the evidence of evidence was not a violation of the law in the
fact. However, it is clear that the sign was not at the time of
observe the sign was not a violation of the law in this case.
The record in this case does not contain any facts in the
fact and the sign was not at the time of the accident. It was not
from a careful examination of all of the evidence in the record that
the location and position of the sign was not at the time of the
investigation at which time the sign was not at the time of the
the other side and in violation of the law of the state of New
Mexico and the state of New Mexico.
Between the parties the facts were established and
substantiating the facts were established in this case.
It is requested by the plaintiff, which is as follows:
"If you find for the plaintiff you will be required to
determine the amount of her damages."
"In determining the amount of damages the plaintiff is

entitled to recover in this case, if any, the jury have a right to, and they should take into consideration all the facts and circumstances as proven by the evidence before them pertaining to plaintiff's physical injuries; the nature and extent of her physical injuries, if any, so far as the same are shown by the evidence to be the direct result of the injury; her pain and suffering, if any, resulting from such physical injuries, and such future suffering and loss of health, if any, as the jury may believe from the evidence before them in this case she has sustained or will sustain by reason of such injuries; all moneys necessarily expended and become liable for, for nurses, hospital charges and doctor's bills, if any, while being treated for such injuries and may find for her such sum as in the judgment of the jury, under the evidence and instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration and proven by a preponderance of the evidence." (Italics ours.)

Defendant's objection to this instruction is directed to ^{she} the language italicized and insists that there was no evidence that plaintiff was suffering pain from the scar at the time of the trial; that there was no evidence upon which to base any assessment of damages for future suffering; and that, inasmuch as the law does not permit the recovery of damages for embarrassment or humiliation by reason of the contemplation of facial disfigurement or for the mere existence of a scar without the presence of physical pain, the court erred in instructing the jury that "future suffering" might be included in the damages assessed for plaintiff.

Plaintiff concedes that embarrassment and humiliation from the contemplation of her scarred face is not a proper element of her damages, but asserts that the inclusion of "future suffering" in the instruction was warranted under the law and had substantial basis in the evidence that the scar was ugly and permanent and involved and disfigured a considerable portion of her cheek and chin. Excluding mental suffering, resulting from embarrassment or chagrin, our courts of review have held that a disfiguring scar resulting from an accident is a proper element of damage.

Dr. Moorehead testified as a witness for plaintiff that "she had a very ugly, extensive scar on the right cheek and chin, a horse shoe scar * * *. It began just below the angle

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of her mouth, in fact it went into the upper lip alightly, and curved around the chin. * * * involving the two lips, the side of the cheek and the chin, up to the mid-line. * * * There was a thickening; no swelling, but a very marked thickening * * *. That is, an increase of tissue from injury * * *. A very disagreeable looking and a very ugly scar. * * * The scar was what we call staggered, that is, one surface was raised higher than the other, and there was a ridge of hypertrophic scar tissue, as we call it, which was red and could be seen at a considerable distance. The line of the scar itself was quite visible. * * * The wound healed very promptly and very satisfactorily, but as happens in a great many cases, it developed what we call hypertrophic scar tissue or scar keloid; that is, a superabundant growth of repair tissue. First of all it was perfectly smooth and even, but there appeared what happened after the first closure, that is, filling up with tissue which of course always leaves an ugly scar. The scar still remains in that condition. It is at the present time quite visible at a reasonable distance. * * * Untreated the scar will remain exactly as it is, and there will be no further improvement. The scar is now stationary, and after practically two years there will be no change."

That permanent disfigurement of one's facial appearance by a scar is a proper element of damages was held in Fitzgerald v. Davis et al., 237 Ill. App. 498. In that case it appeared that plaintiff had sustained, among other injuries, a cut on her left cheek two and one half to three inches long leaving a permanent scar. The court said p. 492:

"The court gave the jury an instruction which told them that if they believed from the evidence plaintiff received a cut on her face as a result of which there was disfigurement which marred her face, then the court instructed them that, under the law of this State, plaintiff could not recover any damages on account of the disfigurement or marring of personal appearance. This instruction was given on behalf of Shlay and was more favorable to him than he

was entitled to under the law. The law only prohibited the recovery of damages in such a case for mental suffering which results from embarrassment or chagrin and which suffering has no relation to physical pain. Chicago City Ry. Co. v. Anderson, 182 Ill. 298. She might recover for disfigurement which resulted from the accident."

In the case of Egan v. Mudd, 262 Ill. App. 373, the court said, p. 377:

"That the appellee has lost hair, suffered pain and sustained a permanent injury to her head is conclusively shown by the evidence. Nothing appears in the record, nor is the location and character of the scar of such a nature to indicate that the jury was not warranted in finding that the scar is disfiguring. These were all elements of damages to be considered by the jury in arriving at the amount of its verdict; that they are not readily estimated in money must be conceded."

It was similarly held in Hosko v. O'Donnell, 260 Ill. App. 544, where the court said, pp. 554, 555:

"Defendant also contends that the court erred in refusing to give as requested by defendant an instruction that the marring of personal appearance and humiliation resulting from the contemplation of bodily disfigurement are not elements entering into computation of pecuniary damages for personal injuries sustained by reason of alleged negligence, and it is asserted that the question of law raised by the refusal of the court to give the instruction 'has never been put squarely to the Supreme Court.' Defendant says the question was not before the court at all in Chicago City Ry. Co. v. Smith, 226 Ill. 178. We do not so construe that case. Moreover, the question was passed on in Fitzgerald v. Davis, 237 Ill. App. 488, and we adhere to that decision."

In the case of Chicago City Ry. Co. v. Smith, 226 Ill. 178, supra, our Supreme court said, p. 184:

"This instruction relates to the elements of damages, and tells the jury, among other elements to be considered 'to what extent, if any, he (appellee) has been injured or marred in his personal appearance, and to what extent, if any, he may have endured physical and mental suffering as a natural and inevitable result of such injury, * * *'. This instruction is alleged to be vicious (1) because there is no evidence in the record which authorized the jury to consider the marring of appellee's personal appearance as an element of damages; (2) because the instruction authorized a recovery for mere mental suffering not connected with physical injuries * * *. In regard to the first objection pointed out to this instruction, the evidence shows that appellee was more or less disfigured about his face, head and shoulder, and while it is true Dr. Wilder testified that he had examined appellee a short time before the trial and that appellee's ear that had been practically severed from his head had assumed its natural position, and that on close examination only the scars could be seen, and that there was only a partial limitation of the use of one arm, still, when all the evidence is considered, there is a substantial basis in it to warrant the instruction."

These decisions unquestionably support the proposition that plaintiff was entitled to recover, as an element of the damage suffered by her, a suitable amount for the permanent disfigurement of her face by the scar on her chin and cheek. The judgment was for \$2,750; of that amount \$720 was stipulated to have been for hospital and medical service, and in our opinion the balance of \$2,030 was neither unreasonable nor excessive in view of plaintiff's pain and suffering and the permanent disfigurement of a considerable portion of her face, but was a conservative estimate of the damage suffered by her.

We have read and carefully considered plaintiff's counsel's argument to the jury and found in it nothing that was intemperate or calculated to arouse passion or prejudice in the minds of the jury against defendant or to her detriment. We find nothing in it that would warrant a reversal of this judgment.

Instruction No. 6, requested by plaintiff, was inaptly and improperly drawn, but in view of the reasonable amount of the verdict we are of the opinion that the error of the court in giving it to the jury was harmless and that substantial justice has been done between the parties both on the question of liability and damages.

For the reasons given the judgment of the Superior court is affirmed.

AFFIRMED.

Gridley and Seanlan, JJ., concur.

These conditions were not met, and the Commission has
still no evidence to support its claim that the
by law a reliable source for the Government's information of the
fact by the year on the date and date. The Government has for
\$2,500 of the amount \$75 was stipulated to have been for the first
and medical services, and in the opinion of the Commission of the
neither unnecessary nor excessive in view of the fact that the
authorities and the Government of the United States of America
of the fact, but was a considerable number of the United States
by law.

It is true that the Commission's investigation of the
statement of the fact and found in its working that was incomplete
or calculated to mislead the Commission in the matter of the fact
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damages.

For the reasons given the Commission of the fact of the fact of the fact
is allowed.

ANNEXURE

36754

FRANK J. KERBER and
ANNA KERBER,
Plaintiffs in Error,

v.

OSCAR B. McGLASSON,
Defendant in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

285 I.A. 614²

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

Plaintiffs Frank J. Kerber and Anna Kerber, his wife, commenced an action in assumpsit against Oscar B. McGlasson for alleged breach of warranty of a statutory warranty deed claiming that a zoning ordinance, enacted by the city of Elmhurst in pursuance of the provisions of the Zoning act of the State of Illinois, was an encumbrance on the real estate conveyed and was not excepted as such encumbrance from the operation of the deed. Defendant's demurrer to plaintiffs' amended declaration was sustained by the court. Plaintiffs electing to stand by their declaration, judgment was entered in favor of defendant and against plaintiffs for costs. By this writ of error plaintiffs seek to reverse the judgment.

Plaintiffs alleged in their amended declaration that October 5, 1927, defendant being the owner of certain described real estate conveyed same to plaintiffs by a statutory warranty deed for a valuable consideration; that defendant warranted by the deed that the property was free from all encumbrances except taxes for the year 1926, and a restriction that no building for residence purposes shall be erected on the land (barns, stables, sheds, garages or other out buildings used in connection with

1075

WILLIAM F. BROWN, JR.
CITY OF NEW YORK

PLAINTIFF

vs.

JOHN W. BROWN, JR.
CITY OF NEW YORK

STATE OF NEW YORK

IN SENATE

1914

IN SENATE
JANUARY 1, 1914

RESOLVED, THAT the bill in relation to the City of New York, passed by the Senate on the 11th day of January, 1914, be amended so as to read as follows:

SECTION 1. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 2. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 3. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 4. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 5. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 6. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

SECTION 7. The City of New York is authorized to acquire by purchase or otherwise, any and all lands, buildings, structures, or other improvements, situated within the City of New York, which are necessary for the use of the City of New York, and which are not owned by any person or corporation, and which are not subject to the payment of taxes.

private residences excepted) that shall cost less than \$6000, and that no buildings of any kind shall be erected within 40 feet of the front line of the land; that defendant breached the warranty contained in his deed because both before and at the time of the execution of the deed the property was encumbered by a zoning ordinance restriction which limited its use to residential purposes only and inhibited its use for business purposes; and that the zoning ordinance of the city of Elmhurst passed in 1924 was in full force and effect at the time the property was conveyed.

Defendant's theory is that a zoning ordinance is not an encumbrance, and that when real estate is transferred by a statutory warranty deed which is silent as to a legally existing zoning ordinance governing and regulating the use of the property, the zoning ordinance being a law of the land is neither a cloud on the title nor an encumbrance; and that, inasmuch as the deed contained a covenant restricting the use of the property for "residence purposes" only, plaintiffs are in no position to complain of the zoning ordinance which did no more than that.

While the covenant in the deed (as alleged in the amended declaration) containing the restrictions as to the erection of a building for residence purposes on the land did not explicitly and absolutely prohibit by its terms the erection of a building of any other class or character, the language of the covenant, including the building line restriction, the minimum cost of a residential building, and reference to out buildings that are the ordinary adjuncts of residences, would seem to indicate that the property was adapted for and its use restricted to the erection of a building for residence purposes only.

Plaintiffs concede that the Zoning act of this state (Cahill's St., ch. 24, sec. 521, et seq.) authorized the city of Elmhurst to enact a zoning ordinance and that by virtue of

1945年12月1日

Die relative Auswertung der Daten wird von der Anzahl der Beobachtungen je Gruppe

6. Ref. TG included - sold - item 1 and 2 will start up by 2003

44-38861-1000

[Faint bleed-through from reverse side]

1. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the American Telephone and Telegraph Company, for the year ending December 31, 1910:

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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... ..

REF ID: A66017

RECEIVED

1950年11月1日

1. *Journal of the American Medical Association*, 1997; 277: 1025-1030.

... ..

1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

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1. *Chrysomelidae* (Coleoptera) 100

that authority such an ordinance was enacted by that city; that it was in full force and effect at the time of the execution of the warranty deed in question; and that it restricted the use of the premises conveyed to the erection of a building for residence purposes only.

Can there be any merit to the contention that such a zoning ordinance in legal contemplation constituted an encumbrance when it is a law of the land? The answer to this question must necessarily be in the negative and it conclusively bars plaintiffs from any recovery in this cause.

The parties must be presumed to have acted with knowledge of the Zoning act of the State of Illinois and the Zoning ordinance of the city of Elmhurst, but even though we presume that they were not aware of the existence of the Zoning ordinance, plaintiffs could readily and easily have ascertained that such an ordinance did exist and it was their duty as purchasers to look out for their own interests. In any event it is clear that they suffered no harm because the warranty deed itself was notice to them that the land was adapted for residence purposes rather than business purposes.

This same question was presented to this court in Kaswell v. Reynolds, 250 Ill. App. 174, where a written contract had been entered into for the purchase and sale of real estate and \$1000 paid as earnest money. After the execution of the contract the purchaser learned that the property was subject to a zoning ordinance and filed a bill to have the contract declared void and to have his earnest money returned to him. Sustaining a demurrer to the bill and dismissing it for want of equity this court said, pp. 177, 178:

"The only question before us on this appeal appears to be whether or not ignorance of such an ordinance is a mistake of fact or a mistake of law; or, whether it is neither a mistake

of fact nor a mistake of law.

"As a general rule it is a well-known maxim that ignorance of law will not furnish an excuse for any person either for a breach or for an omission of duty: Ignorantia legis neminem excusat. And this is as well established in equity as in law. Equity recognizes certain exceptions such as a fiduciary relationship, but the case at bar comes within none of these exceptions. Story's Equity Jurisprudence, vol. 1, sec. 173.

"If individuals were permitted to void solemn obligations because of ignorance of existing laws in force at the time of the execution of said instrument, then such existing laws would become useless and of no value. Story's Equity Jurisprudence (14th Ed.), vol. 1, sec. 173.

"The ordinance in question was a matter of record in the village where the property was located and was easily ascertainable by both plaintiff and defendant. If, as alleged in the bill of complaint neither party knew of that fact, then it becomes the duty of the purchaser to have advised himself as to whether or not such an ordinance was in existence. The existence of a law in a State is a matter concerning which everyone is supposed to have knowledge. * * * The rule is well stated in Story's Equity Jurisprudence (14 Ed.), vol. 1, par. 221, where it is stated:

"A like principle applies to cases where the means of information are open to both parties, and where each is presumed to exercise his own skill, diligence, and judgment in regard to all extrinsic circumstances. In such cases equity will not relieve."

"The Zoning Act of this State was in full force and effect on the statute books of Illinois and the zoning ordinance of the village of Palos Park appears to have been duly passed and became an existing ordinance of the village where the property was located. The fact as to whether there was a Zoning Law in force where the property was located was easily ascertainable and equally open and accessible to both parties, and, under the rule, courts of equity will not relieve in order to make a new contract for the parties.

"Ignorance of the law is defined to be the want of knowledge or acquaintance with the laws of the land in so far as they apply to the act, relation, duty or matter under consideration.

"Under the facts as charged in the bill of complaint and as we have the facts on this appeal, the situation is not one of mistake of law or fact, but comes within the rule, ignorantia legis neminem excusat."

There is no merit to plaintiff's contention that the zoning ordinance was an encumbrance and the trial court was fully justified in sustaining the demurrer to the amended declaration.

For the reasons stated herein the judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley and Scanlan, JJ., concur.

37156

HARRIET A. RIFE,
Appellee,

v.

WILLIAM H. RIFE,
Appellant.

33 1
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

273 I.A. 614³

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

July 8, 1927, complainant, Harriet A. Rife, was granted a decree of divorce from her husband, William H. Rife, defendant. By the terms of the decree property rights were settled between complainant and defendant by his conveyance to her of certain property and payment of \$3500 in her behalf in lieu of alimony. The decree contained a finding "that defendant has agreed to pay to said complainant the sum of \$16 per week, in advance, for the support and education of his child, Ina Eunice Rife, until the further order of the court."

Pursuant to the decree defendant paid \$16 a week for his daughter's support up to and including the month of August, 1931, which payments extended eight months beyond his daughter's attainment of her majority. January 8, 1933, an order was entered by the chancellor directing defendant to pay to complainant in the divorce proceeding \$752 as and for support money for his daughter for a period of time after the child had reached her majority. Defendant prayed and perfected an appeal from this order which was docketed in this court as case No. 36627. April 19, 1933, an order was entered by the chancellor requiring defendant to pay complainant \$200 solicitor's fees

37102

HAROLD A. RIFE,

Appellant,

v.

WILLIAM A. RIFE,

Respondent.

283 I.A. 614

W. A. RIFE, JR.,
WILLIAM A. RIFE, JR.,
WILLIAM A. RIFE, JR.,

July 1, 1937, appellant, Harold A. Rife, was

granted a decree of divorce from his wife, William A. Rife, defendant. By the terms of the decree, appellant was to be entitled to the custody of the child, and defendant was to pay to him the sum of \$100.00 per month for the support of the child. The decree also provided that defendant was to pay to appellant the sum of \$10.00 per week, in advance, for the support and maintenance of his child, and appellant was to pay to defendant the sum of \$10.00 per week, in advance, for the support and maintenance of his child. The decree also provided that defendant was to pay to appellant the sum of \$10.00 per week, in advance, for the support and maintenance of his child, and appellant was to pay to defendant the sum of \$10.00 per week, in advance, for the support and maintenance of his child.

Thereafter, the decree was modified by the court.

For his daughter's support up to and including the month of August, 1937, appellant was to pay to defendant the sum of \$10.00 per week, in advance, for the support and maintenance of his child.

Appellant's application for modification of the decree, January 1, 1938, was granted by the court, and the decree was modified accordingly.

Appellant was to pay to defendant the sum of \$10.00 per week, in advance, for the support and maintenance of his child, and defendant was to pay to appellant the sum of \$10.00 per week, in advance, for the support and maintenance of his child.

Thereafter, the decree was modified by the court, and the decree was modified accordingly.

Appellant was to pay to defendant the sum of \$10.00 per week, in advance, for the support and maintenance of his child, and defendant was to pay to appellant the sum of \$10.00 per week, in advance, for the support and maintenance of his child.

for her defense of the above appeal. The instant appeal seeks to reverse this order.

In an opinion filed November 21, 1933, by this division of the appellate court for the first district, in case No. 36687, we held that the chancellor had no power to order or compel defendant to pay support money for his daughter, under the provisions of the Divorce act, after she had reached her majority. The court having no jurisdiction of the subject matter it necessarily followed that the chancellor lacked authority to enter an order for solicitor's fees or for any other purpose. The order of April 19, 1933, allowing \$200 solicitor's fees to complainant to defend the appeal in case No. 36687 is reversed.

REVERSED.

Gridley and Scanlan, JJ., concur.

for her defense at the same special. The instant special would
to review this order.

is an appeal filed November 21, 1934. By this petition
of the appeals court for the same reasons, as was the 1934.
we held that the classification had no power to direct or compel action
and so pay money for her defense, under the provisions of
the divorce act, after she had been married. The court
having no jurisdiction of the subject matter it accordingly followed
that the commission should not be used as a basis for action.
There is no other purpose. The order of April 12, 1934, after
my 1934 petition's case is complete to review the appeal in
case No. 2454 is reversed.

REVEREND

Original and certified, 111, 1934.

37220

CITY OF CHICAGO,
Appellee,

v.

EAGLE TAXI CO., a
corporation, et al.,
Appellants.

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT, COOK COUNTY.

273 I.A. 614⁴

MR. PRESIDING JUSTICE SULLIVAN
DELIVERED THE OPINION OF THE COURT.

By this interlocutory appeal defendants seek to reverse an order entered by the Circuit court November 1, 1933, granting to complainant, City of Chicago, a temporary injunction restraining defendants from operating certain taxicabs on the streets of the City of Chicago without public vehicle licenses as provided by ordinance.

October 31, 1933, the City of Chicago filed its bill to restrain defendants from operating taxicabs as public passenger vehicles for hire upon the streets of Chicago without public vehicle licenses. The bill, after setting forth in full all ordinances of the City of Chicago providing for the operation and licensing of public motor vehicles, alleged that the unlawful operation of defendants' vehicles caused undue congestion on the streets, interfered with the ordinary and necessary traveling of other vehicles and pedestrians, was a menace to the safety of persons and property lawfully upon the streets, was an undue burden upon the streets and constituted a nuisance.

The bill further alleged that thirty five individual defendants originally made application October 24, 1933, for public vehicle licenses, claiming to be the owners of the

CITY OF CHICAGO,
Appellate.

v.

EASTERN TAXI CO.,
a corporation, et al.,
Appellants.

IN SENATE

JANUARY 1935

CIRCUIT COURT, COOK COUNTY.

2731A.614

MR. JUSTICE DELANEY
DELIVERED THE OPINION OF THE COURT.

By this interlocutory appeal defendants seek to

reverse an order entered by the Circuit Court November 14, 1934,

granting to complainant, City of Chicago, a temporary injunction

restaining defendants from operating certain taxicabs on the

streets of the City of Chicago without public vehicle licenses

as provided by ordinance.

October 31, 1934, the City of Chicago filed its bill

to restrain defendants from operating taxicabs as public passenger

vehicles for hire upon the streets of Chicago without public vehicle

licenses. The bill, after reciting facts in full and ordinances

of the City of Chicago providing for the operation and licensing

of public motor vehicles, alleged that the unlawful operation of

defendants' vehicles caused much confusion on the streets.

Interested with the ordinary and necessary traveling of other

vehicles and pedestrians, was a menace to the safety of persons

and property lawfully upon the streets, was an undue burden upon

the streets and constituted a nuisance.

The bill further alleged that thirty five individual

defendants originally made application October 24, 1934, for

public vehicle licenses, claiming to be the owners of the

vehicles in question, and immediately after filing their applications, and before the public vehicle commission had an opportunity to consider the applications in accordance with the provisions of the city ordinances, proceeded to operate, or caused to be operated for hire the taxicabs described in their applications; that the City of Chicago caused arrests to be made of numerous chauffeurs of the taxicabs for operating them without public vehicle licenses; that despite such arrests, immediately after their release from custody on bonds and pending the trial of their cases, the chauffeurs resumed the operation of the taxicabs and threatened to continue such operation in violation of the ordinances and in defiance of the requirements of the City of Chicago and its public vehicle commission; that thereafter the individual defendants withdrew their applications for licenses and October 28, 1933, defendant Eagle Taxi Co. filed application for licenses for the same taxicabs, claiming to be the owner of them; that it proceeded to operate, or caused them to be operated, without having first secured public vehicle licenses in violation of the ordinances of the City of Chicago and in defiance of it and its public vehicle license commission.

Defendants contend that a court of equity is without jurisdiction to enter the restraining order in question; that the bill of complaint is insufficient; that the ordinances tend to create a monopoly and are inconsistent; and that the facts disclosed in the bill do not constitute a nuisance.

Complainant's theory is that the unlawful operation of the taxicabs as public passenger vehicles for hire upon the streets of the city without public vehicle licenses constituted a menace to the safety and convenience of the public; was an undue burden upon the streets; was a nuisance; and that the municipality may

vehicles in operation, and immediately after filing their applications, and before the public vehicle commission had an opportunity to consider the applications in accordance with the provisions of the city ordinance, proceeded to operate, or caused to be operated for hire the taxicabs described in their applications; that the City of Chicago owned property in a number of instances of the taxicabs for operating them without public vehicle licenses; that despite such actions, immediately after their release from custody on bond, and pending the trial of their cases, the defendants resumed the operation of the taxicabs and threatened to continue such operation in violation of the ordinance and in defiance of the requirements of the City of Chicago and its public vehicle commission; that thereafter the defendants continued to operate their applications for licenses and October 25, 1933, defendant Bagis filed an application for license for the same taxicabs, and claimed to be the owner of them; that it proceeded to operate, or caused them to be operated, without having first secured public vehicle licenses in violation of the ordinance of the City of Chicago and in defiance of its and its public vehicle commission.

Defendant contends that a court of equity is without jurisdiction to grant the restraining order in question; that the bill of complaint is immaterial; that the ordinance tend to create a monopoly and is unconstitutional; and that the facts disclosed in the bill do not constitute a nuisance.

Complainant's theory is that the unlawful operation of the taxicabs as public passenger vehicles for hire upon the streets of the city without public vehicle licenses constituted a nuisance to the safety and convenience of the public; was an undue burden upon the streets; was a nuisance; and that the municipality may

resort to equity to restrain nuisances and to avoid a multiplicity of prosecutions. The following ordinances, upon which this action was predicated, were in full force and effect when the bill of complaint was filed in this cause:

Sec. 2077 of the Revised Chicago Code of 1931 provides substantially that

no public vehicle shall operate for hire upon the streets of the city without first obtaining a license as provided for in the ordinances. Such licenses shall be issued as of January 1 and expire on December 31 next succeeding, unless sooner suspended or revoked. Application for licenses shall be made by the owner upon blanks to be furnished by the public vehicle license commission and such application shall contain the full name and address of the owner, the class of the vehicle for which a license is desired, the length of time the vehicle has been in use, the number of persons it is capable of carrying, and the motor power thereof. No public passenger vehicle shall be licensed until it has been thoroughly and carefully inspected and examined and found to be in a thoroughly safe condition for the transportation of passengers, clean, fit, of good appearance, and well painted and varnished. The commission shall cause such examination and inspection to be made before issuing the license and shall recommend the refusal of a license to any vehicle found to be unfit or unsuited for public patronage. The commission shall withhold the issuance of a license to any person owning, controlling or operating a taxicab to which a taximeter is attached, unless he shall secure a certificate of inspection as provided in the ordinance. The public vehicle license commission is authorized and empowered to establish reasonable rules and regulations for the inspection of public vehicles and their appurtenances, construction and condition of fitness. If, upon inspection, a public vehicle is found to be of lawful construction and in proper condition in accordance with the provisions of the ordinance upon payment of the license fee the same shall be licensed by the mayor and a license and license card delivered to the licensee. Every automobile licensed under the provisions of the ordinance and soliciting patronage on the public streets shall have the name of the owner plainly painted in letters at least two inches in length in the center of the main panel of the rear door of the said vehicle.

Sec. 2076A of the Code provides substantially that

no taxicab license shall be issued unless the commission, after a hearing, shall by resolution declare that public convenience and necessity require the proposed taxicab service for which application for license is made. In determining whether public convenience and necessity require the licensing of such taxicabs the commission shall take into consideration whether the demands of public convenience and necessity require such proposed or such additional taxicab service within the city of Chicago, the financial responsibility of the applicant, the number, kind, type of equipment, the schedule of maximum rates proposed to be charged, the color scheme to be used by the applicant, the increased traffic congestion and demand for increased parking spaces on the streets

of the city which may result, and whether the safe use of the streets by the public, both vehicular and pedestrian, will be preserved by the granting of such additional licenses, and such other relevant facts as the commission may deem advisable or necessary.

Any applicant for a taxicab license shall make proper application therefor on blanks to be furnished by the commission and immediately upon the filing of such application the commission shall cause a notice to be published in one of the leading daily newspapers of the city, which said notice shall set forth the fact that the application has been filed, name of applicant, kind of equipment, and other information from the application which the commission may deem necessary, notifying all holders of existing taxicab licenses that a public meeting will be held at a public place in the city of Chicago designated by the commission, at a time not less than five days nor more than fifteen days after the date of the first publication. All holders of existing taxicab licenses will thereupon be entitled to file any complaints and protests that said holders may see fit. At the time of the holding of the investigation and hearing with reference to whether the public convenience and necessity require the operation of such vehicle or vehicles covered in the application, the commission shall consider all of the complaints and protests and shall have the right to call such witnesses as it may see fit. In such hearings the burden of proof shall be upon the applicant to establish by clear, cogent and convincing evidence which shall satisfy the commission beyond a reasonable doubt, that public convenience and necessity require such operation of the vehicle or vehicles for which said application has been made.

If the commission finds from its investigation and hearing that the public convenience and necessity justify the operation of the vehicle for which license is desired it shall notify the applicant of its finding. Within sixty days thereafter the applicant shall furnish to the commission any and all additional information which may be required and if the commission then finds that the applicant is the owner and bona fide operator of the vehicle for which license is desired and that such vehicle complies with all the ordinances of the city and all the rules and regulations enacted by the commission, license shall thereupon be issued to the applicant upon the payment of the proper license fee. If the commission finds that the public convenience and necessity do not justify the operation of the vehicle it shall forthwith notify the applicant of the finding.

The applicant shall regularly and daily operate his or its licensed taxicabs during each day of the license year to the extent reasonably necessary to meet the public demand for such taxicab service. Upon complete abandonment of taxicab service for a period of ten consecutive days, the commission upon hearing, after five days notice to the owner or operator, shall recommend to the mayor that the license of such owner or operator be revoked covering such taxicabs.

Secs. 597 and 598 of the Code provide substantially that

the public vehicle license commission shall consist of the corporation counsel, the city comptroller and the commissioner of police.

It shall be the duty of the commission to make such investigations as may be necessary for the purpose of licensing and inspecting public vehicles; to conduct the examination of applications for licenses to drive public vehicles, and make recommendations to the mayor as to the licensing of such drivers;

Other items found on the investigation of the vehicle were:

[illegible][illegible][illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the various groups and individuals mentioned in the report. It is therefore necessary to state that the Commission is not in a position to make any conclusions regarding the activities of these groups and individuals at this time.

to make such investigations as may be necessary to establish just and reasonable rates of fare for public vehicles, and make recommendations as to rates of fare to the city council; to make such investigations as may be necessary to determine the number of taxicabs which may be operated on the streets of the city with due regard to the safety of the public, the demand for service and the adequacy of the compensation of the drivers of taxicabs, and make recommendations regarding the subject to the city council; and to make all necessary rules and regulations for the proper enforcement of all ordinances relating to public vehicles.

"Any person violating or failing to comply with any of the provisions of the ordinance for the licensing of vehicles and drivers shall be fined not less than five dollars nor more than one hundred dollars for each offense.

Many cases have been cited by complainant that uphold the doctrine that a court of equity has jurisdiction to enjoin a public nuisance in a proceeding brought on behalf of the public and the fact that the act sought to be enjoined may also be a crime does not deprive the court of such jurisdiction. This rule of law was definitely settled as was also the question that such an action, where the court had jurisdiction under its general equity powers, could be maintained to avoid a multiplicity of suits, in North Am. Ins. Co. v. Yates, 214 Ill. 272, where the court said p. 283:

"We do not agree with the contention that before the State, by its proper officer, can maintain a bill such as this, it must show an injury to civil or property rights. The rule invoked applies to the private citizen who seeks by the writ to prevent a public wrong, because he is not the keeper of the public conscience or the conservator of the public rights (Christie Street Commission Co. v. Board of Trade, 92 Ill. App. 604; Cranford v. Tyrell, 128 N. Y. 341; Sparhawk v. Union Pass. Co., 54 Pa. St. 401; High on Injunctions, sec. 1544.) The rule is well illustrated in the case of public nuisances, which may be prevented or abated at the suit of the Attorney General without showing actual injury to the public, the case of purpresture being a common one, while the private citizen in such a case must show not merely that the act complained of is a public wrong, but also that he suffers special injury to his civil or property rights. (1 High on Injunctions, - 3rd ed. - 387-388.) In informations by the Attorney General charging the violation of public laws by corporations affected with a public interest, injury to the public will be presumed from the violations of the law.

"We are also of the opinion that the bill could be maintained on the ground of avoiding multiplicity of suits."

In that case the superintendent of insurance of the State of Illinois filed a bill to enjoin twenty foreign fire insurance

companies and thirty three individuals acting as their agents from transacting any fire insurance business in this state without first complying with the laws of the state relating to fire insurance. The facts in the instant case are analogous to the situation presented in that case. Here we have a large number of defendants who failed and refused to comply with ordinances of the City of Chicago regulating the operation and licensing of taxicabs.

That municipalities or other governmental agencies, entrusted with powers and duties to be exercised and discharged for the general welfare, may resort to a court of equity for protection and assistance is abundantly supported by the authorities of this and sister states. In Blashfield's Cyclopedia of Automobile Law, p. 145, it is stated:

"The jurisdiction of equity to protect the rights of the state is one of common exercise, usually upon the relation of the Attorney General, but, where the duty of protecting the public interest as against the unlawful operation of public service vehicles is vested in the public utilities board, the authority to vindicate such public right is conferred by necessary implication, and the functions of the Attorney General are bestowed, and such board may choose the remedy either in law or equity, which ever may more speedily and effectively produce relief. Thus, where an action at law against the owners of a public utility jitney for violation of the conditions of its license would be inadequate, the board is entitled to an injunction."

Support of the principle is also found in 42 C. J. 699, par. 142, where it is said:

"A person may be enjoined from carrying on the business of transporting passengers or property for hire by motor vehicles without obtaining a license or certificate of convenience and necessity from the proper authorities, or without a license from the different municipalities through which the motor vehicles pass, or without filing a bond and obtaining a certificate and permit to conduct such business from the proper official or department, or without otherwise complying with valid provisions of the governing statute, or without complying with the conditions upon which the license or certificate was granted; and if an owner or operator carries on such business in violation of such an injunction, he may be judged in contempt."

Complainant's bill sufficiently alleges the essential facts necessary to make out its case. All ordinances pertinent

[illegible]

That investigation of other Governmental agencies, estimates will be made and added to the existing one of charges for the various services, may result in a more or less protection and assistance in financial matters of the various titles of this and other states. In this regard, the various titles of this and other states, it is believed

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REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE
FOR THE YEAR 1897

[illegible]

1. The Commission has been informed that the following information was received from the Bureau of the Census:

to its claimed rights and powers and the alleged wrongdoing of defendants resulting in injury to the general welfare have been set forth in full. The validity of these ordinances has been sustained by numerous decisions. Substantially similar ordinances were declared valid by our Supreme court in The People ex rel. v. Thompson, 341 Ill. 106, where the court said pp. 108, 109-70:

"The Public Utilities act does not take from cities and villages the previously conferred power to regulate taxicabs. The taxicab business, as a general rule, does not include the operation of a conveyance or vehicle over specified routes, under a regular schedule as to time or between definite points, and hence, within the meaning of the Public Utilities act, a taxicab is not ordinarily a public utility. (Newcomb v. Yellow Cab Co., P. U. R. 1916-B, 983; Southern Illinois Light and Power Co. v. Worton, id. 987; Austin Bros. Transfer Co. v. Bloom, 316 Ill. 435.) The right to regulate includes the right to impose reasonable conditions and restrictions. (Westgate v. Adrian Township, 162 N. W. (Mich.) 422; Moloth v. Aurora Electric Light and Power Co., 202 Ill. 218.) The power to regulate the use of streets by vehicles includes the power to promote the general welfare and prevent accidents, and the reasonableness of police regulation is not necessarily what is best but what is fairly appropriate under all circumstances. Weksler v. Collins, 317 Ill. 132; Bligh v. Kirkwood, 237 U. S. 52.) An ordinance will be presumed reasonable until the contrary is proved. (City of Chicago v. Washingtonian Home, 239 Ill. 206; People v. Village of Oak Park, 266 id. 365.) The legislative branch of the State or city may delegate to an administrative board duties involving the exercise of administrative discretion. City of Chicago v. Marriott, 332 Ill. 44; People v. Roth, 249 id. 532; Block v. City of Chicago, 239 id. 251; Arma v. Ayer, 192 id. 601.

"The ordinance in question does not delegate unregulated discretion to the public vehicle license commission. (City of Chicago v. Washingtonian Home, supra; Arma v. Ayer, supra; Milstead v. Boone, 301 Ill. 213.) The foregoing authorities sustain the proposition that a city council may authorize others to do things which it might properly but cannot understandingly or advantageously do.

"The ordinance is not discriminatory on the ground that it singles out taxicabs for regulation and does not apply to private vehicles or other public vehicles drawn by horses. No one has an inherent right to use the streets or highways as a place of business. Where one seeks a special or extraordinary use of the streets or public highways for his private gain, as by the operation of an omnibus, truck, motorbus or the like, the State may regulate such use of the vehicle thereon or may even prohibit such use. Chicago Motor Coach Co. v. City of Chicago, 337 Ill. 200; Prockard v. Benton, 264 U. S. 140; Davis v. Massachusetts, 176 id. 43; Weksler v. Collins, supra."

In passing upon ordinances identical with those involved in this cause, and deciding a contention as to the alleged invalidity of the ordinances as tending to create a monopoly, and in upholding

the right of the city to prohibit the extraordinary use of its streets for the purpose of gain, the United States District Court for the Northern District of Illinois, with three judges constituting the court for the particular hearing, held in Capital Taxicab Co. v. Connak, 60 F. (2d) 608, p. 612:

"To the argument that the ordinance tends to create a monopoly, it is sufficient answer that the city has not by its legislation, surrendered its right to grant other and further certificates to all other applicants. It may still grant applications, and undoubtedly adequate remedy exists against affirmative exercise of arbitrary authority in that respect. The public policy of Illinois has been declared by the Legislature of Illinois, according to the interpretations of the Supreme Court, to be that, before one utility or public carrier is permitted to enter the business of another already in the field, it is but a matter of fairness and justice that it be shown that the new utility answers the demands of public convenience and necessity."

The bill alleges the efforts made by the city to enforce compliance with the ordinance by the arrest and prosecution of many of the individual defendants in a court of law; that such efforts were unavailing; that defendants persisted in the unlawful operation of taxicabs; that they combined and confederated to defeat the law; that they defied the lawfully constituted authorities; that the arrest and prosecution of defendants in a court of law was ineffective; and that the city was without an adequate remedy except in a court of equity.

Under the circumstances disclosed we are constrained to hold that the legal remedy of complainant of prosecuting the offending chauffeurs of defendants' taxicabs for their persistent and continued violations of the ordinances was inadequate, and that a court of equity was fully justified in exercising its jurisdiction to the end that the city might be afforded complete and adequate relief. There can be no question but that the operation of the taxicabs in the manner described in the bill in contempt and disregard of the ordinances of the City of Chicago constituted a

The right of the city to withhold the franchise from any person who is not a citizen of the city, and who is not a resident of the city, is a right which is not subject to the control of the State. The right of the city to withhold the franchise from any person who is not a citizen of the city, and who is not a resident of the city, is a right which is not subject to the control of the State.

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public nuisance on the city's streets.

For the reasons indicated herein the order of the Circuit court granting a temporary injunction is affirmed.

AFFIRMED.

Gridley and Mcanlan, JJ., concur.

Public relations on the side of the...
 For the reasons mentioned herein the order of the
 Circuit court granting a temporary injunction is affirmed.

WITNESSES,

Gridley and counsel, J. J. Conner,

36586

SKY PROJECTOR CORPORATION,
Complainant and Appellee,

v.

AEROGRAPH COMPANY OF AMERICA,
a corporation, GREGOR MELIKOV,
ALFRED F. FRIEDER, EDWARD FRIEDER,
OSCAR FRIEDER, and GENERAL ELECTRIC
COMPANY, a corporation,
Defendants.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

GREGOR MELIKOV, ALFRED FRIEDER,
EDWARD FRIEDER and OSCAR FRIEDER,
Appellants.

273 I.A. 615

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted by Gregor Melikov and the three Frieders to reverse a final decree of the superior court of Cook county, entered October 27, 1932, granting a perpetual injunction and a money judgment of \$1649.10 against them for costs. In the decree the court adjudged that the temporary injunction order entered on June 11, 1927, as amended, enjoining and restraining defendants (Melikov, the Frieders and one other now deceased), be made permanent, and that said four defendants and the Aerograph Company of America, their servants and agents, be perpetually enjoined and restrained

"from projecting or attempting to project words, letters, symbols, pictures or images in or upon the sky or clouds by the use of said Aerograph, and from making or attempting to make said threatened exhibitions and demonstrations of the so-called Aerograph and from making or attempting to make any exhibitions or demonstrations, public or private, to or before any person or persons at any time or place of said so-called Aerograph, or of any apparatus or device constructed by or for the said defendants for the purpose of projecting in or on the sky or clouds any letters, words, symbols, pictures or images and from making, using or transporting any such device or apparatus or plans, drawings, photographs or pictures thereof; and that the said defendants, their agents, servants, employees, all and each of them, be further enjoined from holding forth by letters, telegrams or any form of advertising that they

or any of them are the inventors or owners of the said Aerograph, a sky projector or the complainant's said invention in any form or under any name whatsoever, and from asserting or claiming to have any right, title or interest in any form in or to said invention or any machine based in whole or in part upon said invention; and from selling, leasing, licensing, giving or lending to any person or persons whatsoever the said Aerograph or any apparatus or device involving complainant's said invention, or right to use the same, or any information in any manner or form with respect thereto and from advertising in any form, soliciting or obtaining contracts for use of, said Aerograph or any device or apparatus embodying any features of complainant's said invention in any form or under any name whatsoever."

And the court further adjudged that the defendant,

General Electric Company, its servants and agents, be perpetually enjoined and restrained

"from planning, designing, constructing in whole or in part for the said defendants, Aerograph Company of America, Gregor Melikov, Alfred F. Frieder, Oscar Frieder, and any one or more of them any machine, device or apparatus for projecting or displaying letters, words, pictures or images upon or in the clouds or sky which shall involve any information, plans, specifications or invention disclosed to it by the said Melikov; and from aiding, abetting or assisting in any manner the said defendants in the matter of the construction or use of any such projecting machine; and from receiving or delivering to the said defendants any letters, telegrams or inquiries in any form from advertisers or others as to any such device or apparatus or as to the use, sale, licensing or leasing thereof; and from holding itself forth as receiving such inquiries from advertisers or others, for the said defendants; and from delivering to the defendants aforesaid or to any of them or to anyone for them any such machine or machines or parts of any such machine or machines."

And the court further ordered that said Electric Company be "authorized to dismantle the sky projecting machine manufactured by it for defendant Melikov and to dispose of the parts thereof in such manner as shall not be in violation of the last preceding paragraph of this decree." No appeal was taken by the Electric Company from the decree.

In the preamble of the decree it is stated in substance that the cause came on for final hearing upon complainant's bill, the answers thereto of Melikov, the Frieders and the Electric Company, and complainant's replications to said answers; upon the temporary injunction order entered on June 11, 1927 (as modified by order of April 25, 1929) enjoining Melikov and the Frieders;

upon the injunction order of June 16, 1927, temporarily enjoining the Electric Company; upon the order of April 25, 1929, denying the motion of Melikov and the Frieders to dissolve the temporary injunction order entered against them; upon the order of this appellate court, entered October 22, 1929, affirming the order denying the motion to dissolve; upon the reports of Sidney S. Pollack, master in chancery, to whom the motion to dissolve was referred and to whom also was referred the cause for final hearing; upon the evidence heard by the master on both references; and upon exceptions filed by Melikov and the Frieders to said reports. And it is further stated that the court, having considered the evidence and having heard the arguments of opposing counsel, finds (a) that it has jurisdiction of the parties and the subject matter; (b) that all exceptions to the master's reports should be overruled; and (c) that said reports should be approved and confirmed. Among the findings of the court from the evidence, as set out in the decree, are the following in substance:

That complainant is a New York corporation, with principal office in New York City and engaged in the business of manufacturing, operating and leasing to advertisers in the United States the so-called "Sky Projector," a mechanical device for projecting on the sky written and printed words and images for advertising purposes.

That H. Grindell Matthews, a citizen of England during the World War in 1915, and while attached to the Board of Invention and Research of the British Government, was engaged in devising means to ward off German Zeppelins in England; that while so engaged he constructed a contrivance consisting "of a lens of a focal length of approximately 15 feet, with a 12-inch opening, placed in front of a 24-inch searchlight;" and that on one occasion while making certain observations he conceived the idea of projecting words and images upon the sky.

That in January, 1926, Matthews, continuing with his experiments, went to Wetzlar, Germany, and there caused to be constructed a sky projecting machine which consisted of a lens of a focal length of approximately 15 feet, with a 17-1/2 inch opening, a searchlight and a stencil containing the letters "E. L.;" that when the stencil was placed in front of and at a certain distance from the searchlight the letters appeared sharply defined in the sky; that another machine was there constructed about the same time; that the essential features of both machines were "a lens of 17-1/2 inch opening and a focal length of approximately 15 feet;" and that afterwards one machine was shipped to London and the other to New York City.

That in March, 1926, Matthews applied for a patent covering what he claimed to be his invention, in the Patent Office of Great Britain, also made applications for patents in Germany, France and Canada, and in August, 1926, applied for a patent in the Patent Office of the United States; that thereafter patents were granted to him (though not yet issued) by the Governments of Great Britain and Canada; that no patent has yet been granted to him for the United States, and his application therefor is still pending; that said application was a secret, private and privileged communication from him to said Patent Office and not open to public inspection; that no disclosure of his invention or device was made other than to those persons necessarily associated with him; that his invention, as claimed, consists "of a lens of a focal length of 15 feet, a powerful searchlight and a stencil, placed 15 feet away from the lens;" and that the device is of great value for commercial advertising purposes, in that it can project letters, words, pictures and images upon the sky at night.

That Matthews made arrangements with the Sperry Gyroscope Co. of New York to construct machines embodying his invention; that he assigned to complainant all his right, title and interest in and to said invention and the right to use the same in the United States, and such title, interest and right was at the time of the filing of the present bill, and now is, solely owned by complainant; and that the machines built by Matthews in Germany and those built by said Sperry Gyroscope Co. "are substantially the same."

That Jesse H. Whiteley is the vice-president and general manager of complainant, and holds like official positions with Cecil, Barrato and Cecil, an advertising agency with principal offices also in New York City; that in December, 1926, Whiteley had a confidential interview in Chicago with Philip K. Wrigley, president of William Wrigley Co. of Chicago, in reference to the latter's use of complainant's sky projecting device for advertising purposes; and that shortly thereafter Wrigley went to New York City and had a second interview with Whiteley, seeking further information as to the device, etc.

That defendant Melikov first became interested in the possibility of projecting letters, etc. upon the sky in 1918, in Berlin, Germany, and afterwards made experiments in Chicago with small stereopticon machines; that on January 21, 1927, the Chicago Tribune published an article to the effect that a sky writing machine had been invented in Germany; and that Melikov read the article and brought it to the attention of some of his friends who had witnessed some of his demonstrations with said stereopticon machines at his Chicago residence.

That about February 9, 1927, Melikov called on Wrigley in Chicago and told him that he had a machine for projecting advertising upon the sky; that Wrigley said he had recently made a trip to New York regarding a similar machine and he gave Whiteley's address to Melikov; that on March 15, 1927, Melikov called on Whiteley at the latter's New York office, and told him that "he was an engineer and had been sent by said Wrigley to investigate what was being done with the sky projector machine, and that he wanted to report back to Wrigley;" that Melikov was then introduced "as Wrigley's engineer and technical advisor" to Matthews, and afterwards, at the plant of the Sperry Gyroscope Co. was introduced "as Wrigley's engineer and representative" to Frank

H. House and Preston R. Bassett, both engineers in the employ of said Gyroscope Co.; and that Melikov had several interviews with all of these parties and was "shown the plans" which were then being used in the construction of a machine by the Gyroscope Co. for complainant, and also was given "all the information as to the size of the lens and searchlight, and the various positions of the searchlight, lens and stencil, as used in the machine."

That on March 15, 1927, Whiteley, at Melikov's request, wrote a letter addressed to Melikov at Chicago, in which Whiteley stated that "we hope to be able to show you a demonstration of the Sky Projector in two weeks," and will advise you of the exact day; that, as to complainant's method of leasing machines, "we will agree to lease to any manufacturer a machine with an operator, either to be kept permanently in one city, or mounted on a truck so that it can be moved freely," and we will bear all expense of operation, stencils, etc.; that "our terms, will be approximately \$100,000 for 12 months for a standing machine, and \$120,000 for 12 months for a movable machine;" that machines can be rented for 6 months at a higher proportionate rate; that upon a successful demonstration of the machine, "now being built for us" by the Gyroscope Co., "we will immediately place the machine on the market to be leased;" and that we understand that Mr. Wrigley, as well as many others, are greatly interested in the machine, and we are willing to give a demonstration to any who may attend, and believe we can supply the necessary number of machines for any advertiser in fairly short order. That three days later (March 18th) and again, on April 16, 1927, Whiteley wrote to Wrigley at Chicago. That in the first of these letters Whiteley writes that he had a pleasant visit from Melikov, during which "we showed Melikov the entire layout;" that he said "he would notify you that we had a good proposition;" that the machine will be demonstrated about April 4th, and we would be pleased to have you or one of your representatives in attendance, etc.

That on April 21, 1927, Wrigley wrote Whiteley saying that on his return to Chicago from a western trip he had found Whiteley's letters awaiting him; that "in your letter of March 18th you mention a Mr. Melikov;" that "my recollection is he is the gentleman who came into my office and stated he had a similar kind of a contrivance for advertising in or on the sky;" that the writer told Melikov that he had already had a similar proposition made from your concern, and, upon his request, the writer gave him your name and address; and that "we are giving you this information, so that you will understand that Mr. Melikov is not in any way representing the Wrigley Company, but apparently is an inventor himself and was anxious to see what your proposition was."

That, as appears from a preponderance of the evidence, "Melikov did represent himself as Wrigley's engineer and representative, and that the information given him, as hereinbefore set forth, was given him by reason of said misrepresentations and fraud practiced upon said complainant corporation; that all of said statements made by defendant Melikov to Whiteley, Matthews, Bassett and House, that he was the engineer and technical adviser to said Philip K. Wrigley and that he had been sent by Wrigley to learn the progress being made by said Sky Projector Corporation, and to report back to Wrigley as to the same, were all and each of them wholly false and were known by said Melikov to be wholly false and were made by him with the intent and purpose on his part

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The above information was obtained from a review of the files of the Department of the Interior, Bureau of Indian Affairs, and is being furnished to you for your information.

Wholly false

of deceiving complainant into permitting Melikov to obtain confidential detailed information belonging to complainant regarding said sky projector, for the purpose of enabling him to appropriate the said information to his use and the use of his associates (the Frieders), which information was in the United States the sole property of said complainant."

That on March 17, 1927, Melikov went to the office of the General Electric Co., at Schenectady, New York, for the purpose of ordering a sky projecting machine; that the Electric Co. did thereafter construct for him such a machine "from plans prepared therefor by said Melikov fraudulently obtained by him from complainant;" that the machine, as so constructed by the Electric Co., "consisted of a high intensity searchlight, a plate or stencil, and a long focal length lens of the same size as the lens used in complainant's machine;" that "the spacing between the searchlight, plate or stencil, and said lens, used in the machine constructed by said Electric Co. for Melikov, are substantially the same as the spacing specified in complainant's specifications and plans; and that the only change from complainant's machine is the enclosure of the searchlight, stencil or lens in a tube or barrel."

That Melikov, and certain of the other defendants associated with him and operating as the Aerograph Company of America, informed various advertisers that on May 2, 1927, in the City of Washington, D. C., they would exhibit said machine as so constructed by the Electric Co., and that on said day said machine was in said City of Washington.

That on March 3, 1927, Melikov filed an application in the U. S. Patent Office for letters patent for invention in "sky writing devices;" that no further explanation of the invention appears in the evidence; and that on May 10, 1927, complainant was advised by the U. S. Patent Office "that an interference was filed in said office against the issuance of a patent covering said sky-projector machine upon the patent application of Matthews."

That the interference in the U. S. Patent Office, entitled "Melikov v. Matthews," No. 55463, involved (1) an application for a patent, No. 134,109, filed by Melikov on April 15, 1927, for a device similar to that of Matthews and (2) an application for a patent filed by Matthews in August, 1926, and that in the interference proceeding the invention in controversy was defined as follows:

"Apparatus for effecting optical projection into the sky, a searchlight projector, a transparency illuminated by said projector, an objective having a focal length of not less than approximately fifteen feet so located relatively to said transparency as to give remote real image thereof, and means for directing said image so as to be formed high in the sky."

That the Examiner of Interferences in the Patent Office, by written opinion dated August 14, 1929, and there filed, "decided in favor of Matthews and against Melikov the question of priority of invention of said sky projector;" that subsequently on May 26, 1930, the Board of Appeals of the Patent Office, to which Melikov had appealed from the decision of the Examiner, "decided that the interference should be dissolved on the ground that the issue was unpatentable;" and that on August 18, 1930, the decision

of the Board of Appeals, and its recommendations, were approved by the then Acting Commissioner of Patents and the "interference was dissolved."

And the court, in view of the above evidentiary findings, made among others the following concluding findings in the decree:

"That the invention claimed by complainant was the result of the experiments conducted by Matthews, as hereinbefore set forth, and constituted a valuable property right, irrespective of the question of the findings of the Commissioner of Patents; that the construction of the machine in question was a secret, which Melikov obtained from complainant by means of wrongful misrepresentations, as hereinbefore set forth; and that Melikov appropriated the information so obtained by him to his own use and advantage."

That the General Electric Company should be permitted to dismantle the sky projecting machine, manufactured by it for Melikov, and should be permitted to dispose of the parts of the machine when dismantled.

It appears that complainant's bill was filed in the superior court on June 10, 1927 (i.e., about ten months after Matthews had filed his application for a patent in the U. S. Patent Office, about three months after Melikov had there filed a similar application, about one month after complainant had received notice that an interference had been declared and about two years before any of the decisions in the Patent Office concerning the interference had been rendered); that on the following day (June 11, 1927) the court, on complainant's motion and without notice, granted a temporary injunction against defendants of substantially the same import as the permanent injunction now in question; that on June 17, 1927, after Melikov and the Frieders had respectively filed answers, Melikov presented a written motion (in which the Frieders subsequently joined) to dissolve the temporary injunction, stating, as the main grounds for the requested dissolution (1) that there is no equity on the face of the bill; (2) that the court is without jurisdiction over the subject matter, as set forth in the bill, to issue any injunction; and (3) that the court is without jurisdiction to issue any injunction "before the patent applied for, as

set forth in the bill, is issued;" that thereafter the court ordered that the hearing of the motion to dissolve be referred to a master to hear evidence and to report his findings and conclusions of law and fact; that thereafter a lengthy hearing from time to time was had before the master, at which a mass of oral and documentary evidence was introduced by the respective parties; that on March 20, 1928, the master filed his report, in which he made numerous findings of fact, concluded that the court had jurisdiction of the subject matter and recommended that the temporary injunction be continued in force; that on April 25, 1929, the court, after a hearing on exceptions to the master's report, entered an order denying the motion to dissolve the temporary injunction; and that on defendants' interlocutory appeal therefrom this appellate court, on October 22, 1929, affirmed said order. (254 Ill. App. 611; opinion not published.)

An examination of the printed brief and argument here filed on the interlocutory appeal by counsel for defendants, Melikov and the Frieders, discloses that the following contentions were made as grounds for a reversal of the interlocutory order of April 25, 1928:

- "1. There is no equity on the face of the bill.
2. The complainant has a good remedy at law.
3. The court is without jurisdiction over the subject matter set forth in the bill to issue any injunction.
4. The court is without jurisdiction to issue an injunction in the cause before the patent applied for, as set forth in the bill, is issued.
5. Another action is pending, with respect to the subject matter, in the Interference Court of the United States Patent Office.
6. The record and evidence show that complainant should be barred from any relief, because it comes into court with unclean hands."

In our unpublished opinion, filed October 22, 1929, we decided adversely to all of defendants' said contentions.

saying:

"Arguing that in all cases brought to restrain infringement of patents, the Federal courts of this country have exclusive jurisdiction (and citing among other cases that of Mayana Press Drill Co. v. Ashurst, 148 Ill. 115, 137), defendants' counsel first contend that the superior court of Cook county was without jurisdiction to enter the temporary injunction order of June 11, 1927. In our opinion there is no merit in the contention. Complainant's bill does not seek to restrain the infringement of a patent. Indeed, it does not appear that any patent on the device or machine in question has as yet been issued to anyone. The theory of complainant's bill is in substance that it, as assignee of Matthews, is the owner of a new and useful improvement in Sky Projectors invented by Matthews, which is property; that by misrepresentation and fraud Melikov procured information as to the essential features of Matthews' invention; that Melikov and his co-defendants, in causing machines which embody these essential features to be manufactured and exhibited for sale, have fraudulently appropriated to their own use Matthews' invention; and that complainant is entitled to an injunction to protect its property right and prevent other threatened unlawful acts by defendants. In 20 Ruling Case Law, p. 1163, sec. 45, it is said:

'But although one who invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, has not an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it, yet he has a property in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority.' (See Peabody v. Norfolk, 28 Mass. 452, 453.)

In Joliet Mfg. Co. v. Dice, 105 Ill. 649, 651, our Supreme Court recognized that an invention prior to the issuance of a patent therefor is property. In Rees v. Peltier, 75 Ill. 475, 478, it is said: 'Among the instances of property acquired by one's own act and power of original acquisition, given by elementary writers and courts, is that of literary property, consisting of maps, charts, writings and books; and of mechanical inventions, consisting of useful machines or discoveries, produced by the joint result of intellectual and manual labor.' In Boylston Coal Co. v. Rautenbush, 237 Ill. App. 580, where the bill prayed for an injunction, one of the appellate courts of this district recognized that a property right existed in a certain list of agents, which had been compiled by years of work and at considerable expense, and should be protected by injunction against one who had fraudulently appropriated the list to his own use, saying (p. 559): 'We are not here concerned with the rights of either side as against the people, but with the rights of each as against the other.' * * As between the parties, the list of names must be considered, therefore, as property.' (See, also Stone v. Grapelli Chemical Co., 65 N. J. Eq. 756, 761-2; Westervelt v. National Paper Co., 154 Ind. 673, 677-8; Pressed Steel Car Co., 210 Pa. St. 464, 473-9; Kendall v. Winsor, 21 How. (U.S.) 322, 329.) In Ingle v. Landis Tool Co., 262 Fed. Rep. 150, 154, it is said: 'There is no provision of law that prevents the assignment of the invention not patented. Such is regarded as other property. The law only takes it out of the ordinary when a patent therefor is granted. Then it is that the statute, section 4893, R. S. U. S. (Comp. St. Sec. 9444) applies,

and requires that the assignment, conveyance or grant, or whatever interest therein, shall be in writing.' And the fact that Matthews (complainant's assignor) has an application pending for a patent on his said invention, does not prevent complainant obtaining a temporary injunction against defendants, restraining them from using property fraudulently appropriated. (Ullman v. Thompson, 57 Ind. App. 126, 132-3.) And when Matthews filed his application for a patent on his invention he did not then disclose said invention to the public, for said application until a patent be issued is treated by the Patent Office as a confidential disclosure.

And, after reviewing the voluminous evidence in the present case, we think that the master's findings, confirmed by the court, are amply sustained by the evidence, and that the court did not err in denying defendants' motion to dissolve the temporary injunction. And we think that the allegations of the bill, supported as they are by the evidence introduced before the master, disclose a clear right in complainant to the temporary injunctive relief as prayed. And we do not think, as defendants' counsel further contend, that the evidence shows any such conduct on the part of complainant, or its officials, as should bar it from the temporary injunctive relief as prayed for and as granted by the court."

It appears from the master's report, filed July 15, 1932, as to the proceedings had before him on the final hearing, commenced on November 25, 1931, and continued on subsequent days, that complainant introduced in evidence numerous portions of the testimony of the witnesses called by both parties on the former hearing on the motion to dissolve the temporary injunction, and also two new exhibits, and that the only evidence introduced by defendant were ten new exhibits. And it further appears that the evidence introduced on said final hearing (excepting said exhibits) was substantially the same as that introduced on said motion to dissolve. One of complainant's exhibits is a certified photostatic copy of the decision of the Examiner of Interferences of the U. S. Patent Office, dated August 14, 1929, in which after a lengthy discussion of the evidence on the hearing of the particular interference, the Examiner concluded in part as follows:

"The award of priority is to be entered in favor of Matthews as the first to conceive and first to reduce to practice (citing authorities.)

Matthews has presented testimony and from it, and certain personal testimony of Melikov's, Matthews contends that Melikov had a full opportunity to derive the invention in controversy from him. * *

Priority of invention of the subject matter in issue is hereby awarded to H. Grindell Matthews, the senior party."

The other exhibit of complainant is a certified photo-static copy of the decision of the Board of Appeals of said Patent Office, dated May 26, 1930, on appeal from said decision of the Examiner, in which after much discussion the Board concluded in part as follows:

"We are satisfied that there is nothing patentable in the issue of the interference."

It is hardly necessary to consider the question of priority but it may be pointed out that Matthews is entitled to the date of March 17, 1926, for conception and reduction to practice in view of the filing of his application for the same subject matter in England. * *

Melikov seeks to establish a conception date in 1920 through his Exhibits 1, 2 and 3, and the testimony with relation thereto of his witnesses Pantos, Eisenstadt, McCormick and Genlee. These Exhibits do not disclose anything relating to the length of focus of the lens which is the only possible novelty of the issue except in matter written on the sketch Exhibit 1, and none of these witnesses was able to state whether this matter was on the sketch when it was shown to them in 1920. * *

As to Exhibit 3, it is nothing more than an ordinary magic lantern or projecting device, such as was common long before either party claims to have made his invention.

There is nothing in the testimony on behalf of Melikov which would entitle him to a date of conception prior to March 17, 1926, the date accorded to Matthews of conception and constructive reduction to practice. If we were to make an award of priority we see no reason for disturbing the decision of the Examiner of Interferences.

In view of what we have said the interference is dissolved on the ground that the issue is unpatentable over the prior art."

Defendants' exhibit No. 10, is a certified copy of the decision of the Acting Commissioner of Patents, dated August 18, 1930, on the recommendation of said Board of Appeals, which Board had granted a rehearing on the question of the patentability of the claim or count as contained in Matthews' application as finally amended, (above set forth in our statement of the court's findings in the decree in question,) and which Board on the rehearing decided that "we see no reason for changing our conclusion that

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the issue is unpatentable, and we therefore recommend that the interference be dissolved." Said decision of the Commissioner is as follows:

"The Board of Appeals in its decision of May 26, 1930, recommended that the interference be dissolved on the ground that the issue as defined in the count is unpatentable. This being a recommendation made by the Board upon its own initiative, a rehearing was granted and upon such rehearing the Board adhered to its view that the count was unpatentable and that the interference should be dissolved.

For the reasons set forth at length in the decision of the Board of Appeals, its recommendation is approved and the interference is dissolved."

Defendants' Exhibit No. 2 is a certified copy of Matthews' original application for a patent on his claimed invention, filed in the U. S. Patent Office on August 30, 1926.

Defendants' Exhibits 3 to 9, inclusive, are certified copies of letters, relative to Matthews' claims or counts and amendments thereto, passing between the Commissioner of Patents and a New York firm of patent solicitors, employed by Matthews to obtain a patent, from January 7, 1927 to May 20, 1927.

Defendants' counsel in their printed brief and argument filed on the present appeal make, as grounds for a reversal of the decree now in question, the same six contentions that they made on the former appeal. In our former opinion we made holdings contrary to all of those contentions and, after reviewing all of the evidence contained in the present transcript, we adhere to our decision and holdings as above set forth.

Because of the additional evidence introduced on the final hearing of the cause (viz., said exhibits showing the decisions of the Board of Appeals and the Commissioner of Patents which are against the patentability of Matthews' claimed invention), defendants' counsel here also contend that the present decree should be reversed because Matthews' claimed invention, not being patentable, "cannot be the subject matter of mis-

appropriation, by fraud or otherwise, from complainant by any person," or, in other words, that "there was nothing of value which Melikov could have fraudulently appropriated." To this contention counsel for complainant, in their printed brief and argument make the following reply or counter contention:

"The U. S. Patent Office decisions did not attempt to decide what rights Matthews (complainant's assignor) might have against Melikov, but merely decided that, although Matthews' claim to a patent was superior to that of Melikov's, neither of them was entitled to a patent, i. e., a property right against the whole world. If Melikov had independently discovered the sky projector without any fraud, breach of confidence, or other improper conduct upon his part, Matthews, even though the prior inventor, could not restrain Melikov from using the invention unless and until a patent had issued to Matthews. * * But where a man (Melikov) fraudulently appropriates the property of another and seeks to make use of it to the damage of the owner (complainant), the courts of this State and of other States, in the exercise of their general powers of equity jurisdiction, will restrain such use."

After considering the findings of the court in the decree appealed from, which findings in our opinion are amply sustained by the evidence, we cannot agree with defendants' counsels' instant contention, but do agree with the counter contention of complainant's counsel, which counter contention we believe is amply sustained by the authorities referred to in our former opinion, above quoted. That is said in Peabody v. Norfolk, 98 Mass. 452, 457-8, we regard as particularly applicable to the facts as contained in the present record, viz., (*italics ours*):

"It is the policy of the law, for the advantage of the public, to encourage and protect invention and commercial enterprise. If a man establishes a business and makes it valuable by his skill and attention, the good will of that business is recognized by the law as property. If he adopts and publicly uses a trade mark, he has a remedy, either at law or in equity, against those who undertake to use it without his permission. If he makes a new and useful invention of any machine or composition of matter, he may, upon filing in a public office a description which will enable an expert to understand and manufacture it, and thus affording to all persons the means of ultimately availing themselves of it, obtain letters patent from the government securing to him its exclusive use and profit for a term of years. If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it; but he has a property

in it, which a court of chancery will protect against one who in violation of contract and breach of confidence undertakes to apply it to his own use, or to disclose it to third persons. The jurisdiction in equity to interfere by injunction to prevent such a breach of trust, when the injury would be irreparable and the remedy at law inadequate, is well established by authority."

And in Board of Trade v. Christie Grain & Stock Co., 198

U. S. 236, an injunction case involving the use of certain grain quotations obtained by breach of confidence, it is said (pp. 250-1; *italics ours*):

"In the first place, apart from special objections, the plaintiff's collection of quotations is entitled to the protection of the law. It stands like a trade secret. The plaintiff has the right to keep the work which it has done, or paid for doing, to itself. The fact that others might do similar work, if they might, does not authorize them to steal the plaintiff's." * * The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust and using knowledge obtained by such a breach."

Our conclusion is that the decree of the superior court of October 27, 1932, appealed from, should be affirmed, and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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EMIL FAGERSTROM and HANNAH
FAGERSTROM, as assignees of
Henry Gross,
Defendants in Error,

vs.

ROMAN I. SMOCK,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

273 I.A. 615²

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In a first class action in assumpsit, commenced on January 27, 1930, by Emil Fagerstrom and Hannah Fagerstrom, as assignees of Henry Gross, against Roman I. Smock, there was a trial without a jury on February 3, 1933, resulting in the court finding the issues against defendant and assessing plaintiff's damages in the sum of \$4,294.50. After defendant's motions for a new trial and in arrest of judgment had been overruled, judgment was entered on the same day against him for said sum, which judgment it is sought by the present writ of error to reverse. Only the common law record is before us.

In the statement of claim plaintiff's alleged that on May 10, 1929, "Henry Gross executed two pretended contracts of that date for the purchase by him of lots 20 and 28 in E & D's Crawford Avenue Express 'L' subdivision * * in Cook County, Illinois, said pretended contracts being in words and figures as follows:" Then follow the two instruments which are set out in haec verba. Each is substantially the same as the other except that one refers to lot 20 and the other to lot 28 in the subdivision. Each commences as follows: "This agreement made this 10th day of May, 1929, between EXPRESS 'L' REALTY TRUST, of which Chicago Title & Trust Co. is trustee, under Trust No. 13992, first party, and HENRY GROSS, of Chicago, Illinois, second party, WITNESSETH:" Each is under seal and signed by the parties.--the signature of the first party

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being "by Roman I. Smock." Immediately following the word "Witnesseth" it is provided: "That the first party agrees that if the second party (Gross) shall make and perform all of the agreements hereinafter provided to be made and performed by said second party, the first party will cause to be conveyed and assured to said second party all the right, title and interest of the Chicago Title & Trust Co., an Illinois corporation, as Trustee, in and to the following described lot, piece or parcel of ground, to-wit:" (then follows the legal description of said lot 20 in one instrument and said lot 28 in the other) "subject, however, to the following covenants, conditions and restrictions." (Then follow numerous conditions and restrictions). It is then stated that "the second party covenants and agrees (1) to pay to Lake Shore Trust & Savings Bank, or to any one designated by first party, the sum of \$6200 (i. e., for each lot) in the manner following: \$1550 on the execution of this contract, paid to the manager of said trust (the receipt of which is hereby acknowledged) and the sum of \$1880 in monthly installments of \$40 or more each, payable on or before the 10th of each and every month and after date hereof, beginning June 10, 1929, and the final installment of \$2770, to be paid on or before the 10th day of May, 1933, with interest at 6% per annum, payable semi-annually, June and December, on the balance remaining from time to time unpaid; (2) to pay all general taxes levied and assessed against said premises for the current year and subsequent years," etc. Then follow numerous other covenants, not here material.

And in said statement of claim plaintiff's further allege:

"That on the date of the execution of said pretended agreements, May 10, 1929, and thereafter, there was paid to defendant on account of said pretended agreements the sum of \$4373, the receipt whereof was duly acknowledged by defendant, said payments having been made as follows: May 10, 1929, \$3700; May 14, 1929, \$600; and July 15, 1929, \$73; that thereafter on May 13, 1929

[illegible]

(i. e., three days after the stated date of the agreements) said Henry Gross assigned and set over unto plaintiffs all interest in and to said pretended contracts and all right, title and interest therein, and plaintiffs are now the actual bona fide owners thereof, said assignments being in words and figures as follows:

There is then set out in hac verba the two written assignments (one for each agreement), each dated May 13, 1929, and signed and sealed by Henry Gross and the two plaintiffs, in which it is stated: "In consideration of the unpaid balance, at this date amounting to \$4350, I, Henry Gross (hereinafter called 'Assignor'), second party in the attached contract, dated May 13, 1929, do hereby sell, assign, transfer and set over unto Emil Fagerstrom and Hannah Fagerstrom, wife, (hereinafter called 'Assignee') * * all of the assignor's right, title and interest in and to said attached contract." And in each assignment is also contained the following words:

"This assignment shall be of no force or effect unless the written consent of ROMAN I. SMOOK (hereinafter called 'Third Party') is endorsed hereon. The assignee herein named (plaintiffs) does hereby accept this assignment subject to such written consent of the Third Party, and subject to all the terms, provisions, conditions and limitations in said attached contract contained. And the assignee (plaintiffs) does hereby covenant and agree to and with the assignor (Gross) and the Third Party (Smook) that if said Third Party shall fully consent in writing to this assignment, the assignee (plaintiffs) will fully and promptly carry out and perform each and every of the terms, conditions, covenants and agreements provided in said attached contract to be performed by the second party thereto (Gross.) * *

In consideration of the consent of the Third Party to this assignment, the assignor (Gross) does hereby discharge and forever release the Third Party of and from any and all obligations or liabilities to the assignor (Gross) of any nature or kind whatsoever, arising from any cause whatsoever."

Each of the assignments bears Smook's written consent thereto as follows: "The foregoing assignment is consented to this 13th day of May, 1929. (Signed) ROMAN I. SMOOK, Third Party." And in said statement of claim plaintiffs further alleged:

"That neither of the plaintiffs nor said Henry Gross received any consideration for the several payments as aforesaid, and that defendant at no time conveyed or offered to convey or cause to be conveyed to plaintiffs, or said Gross, the real estate described in the pretended contracts; that said pretended contracts

do not purport to be contracts by plaintiffs, or by their assigner, Gross, with any living or artificial person, but to be purported contracts between said Gross and a written document or chose in action; that said purported contracts are and always were null and void; and that by reason thereof the defendant (Smook) then and there became obligated and indebted to plaintiffs for the money heretofore paid to him on account of said pretended and purported contracts in the sum of \$4,373, together with interest from the date of payment thereof at the rate of six per cent. per annum."

Accompanying the statement of claim is the affidavit of Emil Fagerstrom, one of the plaintiffs and the authorized agent of the other plaintiff (his wife), to the effect that he has knowledge of the facts as set forth in said statement; that the suit is for the recovery of money only; and that there is due to plaintiffs from defendant, after allowing to him all just credits, etc., the sum of \$4373, together with interest thereon as stated.

The present record further discloses that on February 21, 1930, defendant filed an affidavit of merits in part as follows:

"(1) That the alleged assignments, under which plaintiffs claim, do not purport, nor are they effective, to assign to plaintiffs any right of action which the assignor, Gross, might have had for the recovery of money paid by him to defendant.

(4) And defendant denies that there was paid to him or to anyone in his behalf by said Henry Gross, the sum of \$4373,** but states that the only money paid to him by said Gross was \$600, and that no money has ever been paid to him by plaintiffs."

There are three other paragraphs, Nos. 2, 3 and 5, in said affidavit of merits, alleging other claimed defenses to plaintiffs' action, but the present record discloses that on July 10, 1930, the court, on plaintiffs' motion, ordered said paragraphs, Nos. 2, 3 and 5, stricken, and gave leave to defendant to file within 30 days his interlocutory bill of exceptions to said order. The record also discloses that within apt time a bill of exceptions was presented, but as the same is not contained in the present record the correctness of the court's ruling in striking said paragraphs is not before us for review.

The main contention of defendant's counsel is that plain-

do not appear to be connected by similarity, or by their actual
gross, with any living or official estate, but to be purchased
contracts between a living and a dead estate or estate in
action; that said deceased contract is not a living estate and
void; and that by reason thereof the deceased (deceased) estate and
there became obligated and indebted to the estate for the money
hereof paid to the deceased estate and purchased and purchased
contracts in the sum of \$4,575, to be paid to the estate for the
date of payment thereof at the rate of six per cent. per annum."

Accordingly, the statement of claim is the affidavit of
 Earl T. Kerkner, one of the plaintiffs and the defendant against
 of the other plaintiff (his wife), as the record shows he was living
 state of the State as set forth in said statement; that the said is
 for the recovery of money only; and that there is due to plaintiff
 from defendant, after allowing to him all just credits, etc., the
 sum of \$4575, together with interest thereon as aforesaid.

The present record between deceased and on February 21,
 1930, reference being to affidavit of service in part as follows:

"(1) That the said deceased, under which plaintiff's
 claim, do not appear, nor any affidavit, to assign to claim
 title or right of action with the exception, given, might have been
 for the recovery of money paid by him to defendant."

"(2) And defendant further said there was paid to him or
 to anyone in his behalf by said Henry Brown, the sum of \$4575,
 but a note was only paid to him by said Brown was \$500,
 and that no money has ever been paid to him by plaintiff."

There are three other paragraphs, Nos. 3, 4 and 5, in said
 affidavit of service, affecting other claims between to plaintiff's

action, but the present record discloses that on July 10, 1930,
 the court, on plaintiff's motion, entered said paragraph, Nos.
 3, 4 and 5, striking, and gave leave to defendant to file within
 30 days his supplementary bill of exceptions to said order. The
 record also discloses that within the time a bill of exceptions
 was presented, but as the same is not contained in the present
 record the correctness of the court's ruling in striking said
 paragraphs is not before us for review.

The main question of defendant's counsel is that plain-

tiffs' statement of claim does not state a cause of action, sufficient to sustain the present judgment. We cannot agree with the contention. In the case of Gardner v. Shingleton, 253 Ill. App. 333, the claim of the plaintiff was for the recovery back of certain moneys paid under a somewhat similar contract with the "Shingleton Brothers Realty Trust," and the judgment in favor of the plaintiff was affirmed, - the court holding (p. 337) that the "contract lacks mutuality because there is no one against whom plaintiff could proceed as vendor to compel a conveyance," and further saying (p. 336, italics ours):

"The real point at issue springs from the contention that the contract is null and void as the vendor in the contract is neither an individual, a partnership, nor a corporation, and that therefore as defendants received plaintiff's money under the pretense that said contract was valid, they are liable to pay the same back to plaintiff, as money had and received for his benefit. We think the point is well taken. If the vendor in the contract is not a partnership, an individual or a corporation, then no action would lie against it, and we find no evidence in the record which would warrant any other conclusion. This being so, plaintiff has a right to recover his damages as for money had and received by defendants to plaintiff's use." (citing numerous authorities.)

Defendant's counsel, in arguing that the agreements set forth in plaintiffs' statement of claim are valid agreements and not void for want of mutuality, and that, hence, plaintiffs' statement of claim fails to state any cause of action for the recovery back of moneys paid on the agreements, refers to the case of Beilin v. Arenn & Date, 350 Ill. 284. We fail to see wherein that case is in point as regards the contention that said statement of claim does not state a cause of action. That case was decided upon evidence heard before court and jury, and the court said (p. 288): "The facts convince us that the vendor was a legal entity. The vendor consisted of three living persons doing business under a trade name." What facts appeared on the trial of the present case we cannot determine, as there is no bill of exceptions contained in the record, and we must presume that the court found from the evidence introduced upon the trial that the "Express 'L' Realty Trust" was not a legal entity,

firm's statement of affairs for the year 1934, which is
 client to maintain the account in 1935. In a letter dated 1935
 connection. In the case of Robert X. Robinson, 222 Ill. App. 222.
 the claim of the plaintiff was for the recovery of certain
 money paid under a contract which contract with the defendant
 Brothers Realty Trust," and the judgment in favor of the plaintiff
 was affirmed, - the court holding (p. 227) that the "contract made
 mutually because there is no one against whom plaintiff could pro-
 ceed as vendor to compel a conveyance," and later saying (p. 228,
 italics ours):

"The real point at issue between the two parties is whether
 contract is null and void as the vendor in the contract is neither
 an individual, a partnership, nor a corporation, and the contract
 as defendant's money under the contract that said
 contract was void, and the claim to pay the same back to plaintiff
 as money paid and received for his benefit. The claim for the
 well known. It is vendor in the contract is not a partnership,
 individual or a corporation, and no action could be taken if
 and we find no evidence in the record that the plaintiff was a
partnership. This being so, plaintiff has a right to recover his
 money as for money paid and received by defendant as plaintiff's
 use." (citing Robinson v. Robinson).

Defendant's demand, in writing from the plaintiff set
 forth in plaintiff's statement of claim are void, erroneous and not
 void for want of substance, and that, hence, plaintiff's demand
 of claim shall be set aside and action for the recovery back of
 money paid on the contract, return to the case of Robinson v. Robinson
1 Data, 222 Ill. App. 222. We hold that the contract that was in point
 as regards the defendant's claim was null and void as of its own
 state a contract of action. There was no decision upon Robinson heard
 before court and jury, and the court said (p. 228) "The facts con-
 vince us that the vendor was a legal entity. The vendor consisted of
 three living persons doing business under a trade name." That these
 appeared on the trial of the present case as cannot be denied, and
 there is no bill of particulars attached to the record, and we must
 presume that the court found that the evidence introduced upon the
 trial that the "Robinson Realty Trust" was not a legal entity.

that the agreements set forth in plaintiffs' statement of claim were void for lack of mutuality, and that plaintiffs had actually paid to defendant under the contracts certain moneys which with interest amounted to \$4,294.50, and which defendant had not paid back. It is said in Egleston v. Royal Trust Co., 205 Ill. 170, 172, "As the proceeding was one at law, it will be presumed, in the absence of a bill of exceptions, that the evidence heard was ample to support the judgment." (See, also, Clark v. Burke, 172 Ill. 109, 111; Boyles v. Chytrous, 175 id. 370, 374.)

And this well settled rule is also a complete answer, in our opinion, to defendant's counsel's further contention, viz., that the assignments of the agreements (as set forth in plaintiffs' statement of claim) "provide that plaintiffs shall pay the balance of the purchase price due under the contracts, and no provision is made in the assignments granting to the assignees (plaintiffs) the right to bring an action for the recovery of money paid by Henry Gross to the Express "L" Realty Trust, or in any event against the agent (Smook) of such Trust." For aught that appears in the present record to the contrary plaintiffs may have actually paid to the defendant all of the moneys, which it is alleged defendant (Smook) received, and Gross may not have paid any part thereof. Furthermore, the contention is not properly before us for consideration as the only error assigned on the record is that "plaintiffs' statement of claim shows no cause of action against the defendant."

Finding no reversible error in the record the judgment in question against defendant, entered on February 3, 1933, for \$4,294.50, is affirmed.

1931,
AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

36672

LEONA KOENIG,
Complainant and Appellant,

v.

HAIF NASSAR, CECILIA NASSAR,
his wife, COSMOPOLITAN STATE
BANK, a corporation, as Trustee,
et al.,

Defendants.

COSMOPOLITAN STATE BANK,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

273 I.A. 615

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

Leona Koenig, complainant in a proceeding to foreclose a first trust deed on certain premises appeals, as stated in her appeal bond, from a "parity decree," entered by the circuit court of Cook county on December 20, 1932. Her amended bill was filed on January 26, 1932, to which the Cosmopolitan State Bank, individually and as trustee under said first trust deed and also as trustee under a junior trust deed, filed its answer. On a hearing before a master much evidence was heard on the question whether the Cosmopolitan State Bank (hereinafter called the Cosmopolitan Bank) had in its individual capacity "purchased" a certain past due principal note and past due coupon notes, executed by the mortgagors (Nassar and wife) and secured by said first trust deed, or whether the Bank, acting as a volunteer, had "paid" said notes for and on behalf of the Nassars. The master in his report, filed May 26, 1932, found in effect that the Cosmopolitan Bank had not purchased the notes, but on the contrary had, under an agreement with the makers (the Nassars) which was unknown to

22072

LEON ROBERTS, complainant and defendant,

v.

MARY HANNAH, GEORGE HANNAH, his wife, COMMODITIES TRADING BANK, a corporation, as defendants.

APPEAL FROM

CIRCUIT COURT,

JOHN COUNTY.

273 I.A. 615

COMMODITIES TRADING BANK, Defendant.

THE JUSTICE COURT DURING THE COURSE OF THE CASE.

Leon Roberts, complainant in a proceeding to foreclose a first trust deed on certain business property, as stated in his appeal brief, from a "party debtor," entered by the circuit court of Cook county on November 24, 1932. The amended bill was filed on January 26, 1933, in which the Commodities Trading Bank, individual and as trustee under said first trust deed and also as trustee under a further first deed, filed its answer. On a hearing before a master upon evidence and issues on the question whether the Commodities Trading Bank (hereinafter called the "complainant") had in its individual capacity "partaken" a certain part of the principal debt and paid the same notes, asserted by the mortgagee (Robert and wife) and secured by said first trust deed, or whether the bank, acting as a volunteer, had "paid" said notes, for and on behalf of the bank. The master in his report, filed May 26, 1933, found in effect that the Commodities Bank had not purchased the notes, but on the contrary had, under an agreement with the bank (the "debtor") which was unknown to

complainant, voluntarily paid the notes, and that the notes "thereupon became and are subordinate to the lien" of said first trust deed "for the payment of all sums due or to become due under said trust deed and all unpaid notes and interest coupons secured thereby," etc. Upon exceptions of the Cosmopolitan Bank to the master's report, and after argument on a hearing, the court entered its said decree in which it made findings on the particular issue contrary to those of the master, but in other respects approved and confirmed the master's report. Among the findings of the master are the following in substance:

2. That on March 17, 1927, the Nassars, husband and wife, being indebted in the sum of \$14,000, executed and delivered their four (4) principal notes, payable to bearer, as follows:

Note No. 1, for \$1,000, due March 17, 1929.

Note No. 2, for \$1,000, due March 17, 1930.

Note No. 3, for \$1,000, due March 17, 1931, and

Note No. 4, for the balance of \$11,000, due March 17, 1932

with interest on said principal sums at 6 per cent per annum, payable semi-annually, as evidenced by attached interest coupon notes, also payable to bearer.

4. That to secure the payment of the indebtedness, so evidenced by the notes, the Nassars on the same day executed and delivered the first trust deed in question to the Cosmopolitan Bank, as trustee, conveying the premises involved and containing the usual covenants, which trust deed was duly recorded.

6. That principal notes Nos. 1 and 2, and the interest due thereon, were paid at the respective maturities thereof; that principal note No. 3, for \$1,000, together with the accrued interest of \$30 thereon, due on March 17, 1931, and coupon note, No. 3, for \$330, (for interest on said principal note No. 4), due on March 17, 1931, "were not paid by the makers thereof, but were paid by the Cosmopolitan Bank, in accordance with an agreement with the makers, which agreement was unknown to complainant, and were and are held by the Cosmopolitan Bank uncancelled;" that said payment by the Bank "constituted a voluntary payment for and on behalf of the makers of said note and interest coupons, and that said note and interest coupons thereupon became and are subordinate to the lien of the trust deed hereinto ^{brought} foreclosed, for the payment of all sums due and to become due under the trust deed and all unpaid notes, and interest coupons secured thereby, together with all advancements made in connection therewith and costs incurred."

7. That on September 17, 1931, interest coupon note No. 3, for \$330, became due and payable, but the Nassars failed to pay the same; that demands were made upon them for its payment but that neither the Nassars nor any of the other defendants pa'

complaint, voluntarily paid the note, and that the notes "thereupon became and are payable to the bank" of which they "thus used" for the payment of all sums due or to become due under said first and all unpaid notes and interest coupons accruing thereon." etc. Upon completion of the Corporation Bank to the master's report, and after its receipt on a hearing, the court entered its said decree in which it made findings in the particular issues contrary to those of the master, but in other respects approved and confirmed the master's report. Among the findings of the master are the following in substance:

2. That on March 17, 1907, the Wabash, Hubbard and Wells, being indebted to the bank of \$14,000, executed and delivered their note (1) principal notes, payable to bearer, as follows:

Note No. 1, for \$1,000, due March 17, 1907.
 Note No. 2, for \$1,000, due March 17, 1907.
 Note No. 3, for \$1,000, due March 17, 1907, and
 Note No. 4, for the balance of \$11,000, due March 17, 1907.

with interest on said principal sums at 6 per cent per annum, payable semi-annually, as evidenced by attached interest coupons noted also payable to bearer.

4. That to secure the payment of the indebtedness, so evidenced by the notes, the Wabash on the said day executed and delivered to the bank a trust deed in relation to the Corporation Bank, as trustee, conveying the premises lawfully and lawfully recorded. The several mortgages, which have not been fully recorded.

5. That principal notes Nos. 1 and 2, and the interest thereon, were paid to the respective mortgagees in full; that principal note No. 3, for \$1,000, together with the accrued interest of 30 percent due on March 17, 1907, and coupon note, No. 4, for \$1,000 (for interest on said principal note No. 4), due on March 17, 1907, were not paid by the bank, but were paid by the Corporation Bank in accordance with an agreement with the bank, which agreement was made to the bank, and were not held by the Corporation Bank. That said payment by the bank "constituted a voluntary payment for and on behalf of the bank" of said note and interest coupons, and that said note and interest coupons were not recorded, for the payment of all interest coupons thereon and are not recorded to the bank of the bank, but were recorded, for the payment of all sums due and to become due under the first and all unpaid notes, and interest coupons accrued thereon, together with all "dividends made in connection therewith and costs thereof."

7. That on September 17, 1907, interest coupon note No. 5, for \$1,000, payable to bearer, but the Wabash failed to pay the same; the dividends were made upon them for the year, but that neither the Wabash nor any of the other mortgagees

the same or any part thereof.

8. That complainant is the legal owner and holder of said principal note, No. 4, for \$11,000, and of interest coupon notes, Nos. 9 and 10, each for the sum of \$330, and that by reason of the default in the payment of said coupon note, No. 9, due on September 17, 1931, she elected to declare, and on October 17, 1931, did declare the whole indebtedness secured by said trust deed to be immediately due and payable and filed her original bill to foreclose in the present action.

13. That there is due to complainant, under the terms of said trust deed, for principal, accrued interest, solicitors' fees, expenses, etc. the total sum of \$13,175.68, which amount the master finds to be a valid indebtedness due under the provisions of said trust deed from the Nassars, who are personally liable therefor, and for which amount said trust deed "constitutes a first, prior and paramount existing lien on the real estate described and the rents, issues and profits thereof."

15. That there is due to the defendant, Cosmopolitan Bank, because of its payment of said principal note, No. 3, for \$1,000, due on March 17, 1931, as well as its payment of the coupon notes, aggregating \$360, also then due, together with accrued interest, stenographer's fees, expenses, etc. the sum of \$1471.73, less the sum of \$100, paid to said Bank by said Nassars, or a net sum of \$1371.73, which amount the master finds to be a valid indebtedness due under the provisions of said trust deed from the Nassars, who are personally liable therefor, and for which amount said trust deed "constitutes a second lien on the real estate described, and the rents, issues and profits thereof, subject only to the lien of complainant under said trust deed, as hereinbefore set forth."

16. That the Nassars are the present owners of the equity of redemption of the premises herein involved.

17. That the defendant, Naif Nassar, on or about March 21, 1928, being indebted to the Cosmopolitan Bank in the sum of \$3500, executed and delivered to the bank his collateral note of that date and for that sum, and pledged as collateral security for the note a junior trust deed upon the premises, which deed has been duly recorded, and which collateral note has been reduced by payments made to \$1700, which sum remains due and unpaid, with interest thereon from January 13, 1932.

19. That there is due to the defendant, Cosmopolitan Bank, from the two Nassars, under the terms of said collateral note and said junior trust deed, pledged as aforesaid, the sum of \$1739.66, which amount the master finds to be a valid indebtedness from the Nassars, who are personally liable therefor, and for which amount "said junior trust deed constitutes a lien on the real estate described, and on the rents, issues and profits thereof, subject to the liens of complainant and the Cosmopolitan Bank, under said first trust deed, as hereinbefore set forth."

20. That the court has jurisdiction of the subject matter of this cause and of all the parties hereto; that the material allegations of complainant's amended bill have been proven and are sustained by the evidence; and that the equities of the cause are with complainant.

the same on my part thereof.

8. That complaint is the legal owner and holder of said principal note, No. 4, for \$1,000, and of interest coupon notes, Nos. 2 and 3, each for the sum of \$500, and that by reason of the default in the payment of said coupon note, No. 2, due on September 14, 1921, she elected to declare, and on October 14, 1921, did declare the whole indebtedness secured by said note to be immediately due and payable and filed her original bill to foreclose in the present action.

9. That there is due to complainant, under the terms of said trust deed, for principal, accrued interest, collection fees, expenses, etc., the total sum of \$15,175.00, which amount the master finds to be a valid indebtedness due under the provisions of said trust deed from the borrower, who are personally liable therefor, and for which master said trust deed "constitutes a first prior and paramount lien on the real estate described and the rents, issues and profits thereof."

10. That there is due to the defendant, Comopolitan Bank, because of its payment of said principal note, No. 4, for \$1,000, due on March 14, 1921, as well as its payment of the coupon notes, aggregating \$500, also when due, together with accrued interest, amounting to \$1,000, expenses, etc., the sum of \$14,175.00, from the sum of \$15,000, held by said Bank by said borrower, or a net sum of \$1,825.00, which amount the master finds to be a valid indebtedness due under the provisions of said trust deed from the borrower, who are personally liable therefor, and for which master said trust deed "constitutes a second lien on the real estate described, and the rents, issues and profits thereof, subject only to the lien of assignment under said trust deed, as hereinafter set forth."

11. That the master and the present owners of the property of redemption of the premises herein involved.

12. That the defendant, said bank, on or about March 21, 1922, being indebted to the Comopolitan Bank in the sum of \$38,000, executed and delivered to said bank his collateral note of that date and for said sum, and pledged as collateral security for the note a certain sum of money upon the premises, which deed has been duly recorded, and which collateral note has been reduced by payments made to 17,000, which sum remains due and unpaid, with interest thereon from January 15, 1922.

13. That there is due to the defendant, Comopolitan Bank, from the two borrowers, under the terms of said collateral note and said junior trust deed, pledged as collateral, the sum of 17,000.00, which amount the master finds to be a valid indebtedness from the borrowers, who are personally liable therefor, and for which master said junior trust deed constitutes a lien on the real estate described, and on the rents, issues and profits thereof, subject to the lien of assignment and the Comopolitan Bank, under said trust deed, as hereinafter set forth."

14. That the court has jurisdiction of the subject matter of this cause and of all the parties hereto; that the material allegations of complaint are true and have been proven and are sustained by the evidence; and that the existence of the facts are with complainant.

The master recommended that a decree of foreclosure be entered in conformity with the above findings and conclusions and in accordance with the prayer of complainant's amended bill. In the decree appealed from many of the court's findings are substantially the same as those of the master, but among the contrary findings are the following in substance:

That while, as found by the master in the 6th paragraph of his findings, principal note, No. 3, for \$1,000, together with the accrued interest thereon of \$30, due on March 17, 1931, and coupon note, No. 8, for \$330 (for interest on said principal note, No. 4, for \$11,000), due on March 17, 1931, "were not paid by the makers thereof (the Nassars), but were paid by the Cosmopolitan Bank, in accordance with an agreement with said makers, which agreement was unknown to complainant, and were and are held by the Cosmopolitan Bank uncancelled," and while said payment by the Bank "constituted a voluntary payment for and on behalf of the makers of said note and interest coupons," nevertheless "said note and interest coupons thereupon became and are on a parity with the lien of the trust deed herein sought to be foreclosed, for the payment of all sums due and to become due under the trust deed and all unpaid notes, and interest coupons secured thereby, together with all advancements made in connection therewith and costs incurred."

That there is due to complainant, under the terms of said trust deed, for principal, accrued interest, solicitors' fees, expenses, etc. the total sum of \$12,975.68 (instead of \$13,175.68, as found by the master, which reduction of \$200 is on the amount of solicitors' fees allowed to complainant.)

That there is due to the defendant, Cosmopolitan Bank, the total sum of \$1371.73, "which amount the court finds to be a valid and subsisting indebtedness due under the terms and provisions of said trust deed from the defendants, the Nassars, who are personally liable therefor."

"That the master in his report found that the Cosmopolitan Bank has a subordinated second lien, on the premises herein foreclosed upon, to the extent of \$1371.73, * * which amount the master found was due to it by reason of it having paid principal note, No. 3, for \$1,000, and interest coupon notes for \$360, of the series of notes secured by the trust deed herein foreclosed upon; that the Cosmopolitan Bank heretofore filed objections before the master, which objections were by order herein ordered to stand as exceptions; that the court hereby sustains objections Nos. 1, 2 and 4, and overrules the remainder of the objections, and the court hereby orders that the master's report is hereby in said respects modified."

"And the court further finds that said principal note for \$1,000, and said interest coupon notes for \$360, were purchased by said Cosmopolitan Bank from the complainant and that prior to the payment of the purchase price for said note and coupons complainant and her husband, Raymond Koenig, as her agent, had placed said note and coupons with said bank for collection in the collection department of said bank; that on or about the date of

the maturity of said notes said Raymond Koenig, acting for complainant, withdrew said note and coupons from the collection department of said bank, and at the time of such withdrawal was advised by the teller of said collection department of the bank that said note and coupons had not been paid by said Nassar; that on the same day said Koenig, being so advised, withdrew said note and coupons and stated to said collection teller that he would handle the collection thereof direct; that thereupon, on the same day, said Koenig took said note and coupons to the bond department in the adjoining room, presented the same to the teller and received from him the check therefor which was introduced in evidence; that said transaction constituted a sale of said note and coupons to the Cosmopolitan Bank; and that said purchase by the bank was made at the request of said Nassar."

And the court in the decree further found and ordered that the Cosmopolitan Bank "has a lien on the property foreclosed upon in the sum of \$1371.73, with interest thereon from May 12, 1932, (the date of the master's report) on a parity with the lien of complainant as hereinbefore found." And in the decree are contained the following statements:

"From which modified portion of the master's report and the decree entered herein complainant prays an appeal," etc.; that the court orders that the master's report is in all other respects approved and confirmed, except as modified herein; that all other objections or exceptions to said report are overruled; that "the sale of the premises herein foreclosed upon may be proceeded with under the decree pending the determination by the appellate court of the question of the parity of lien involved herein;" that complainant and the Cosmopolitan Bank, through their respective solicitors, "hereby stipulate and agree that the appeal herein prayed may be taken solely for the purpose of determining the question of parity or priority of lien of the trust deed foreclosed upon as against the claim of the Cosmopolitan Bank, which is hereby allowed in the sum of \$1371.73, together with interest thereon from May 13, 1932, at 7% per annum."

And the court in the ordering part of the decree ordered and adjudged, as is usual in foreclosure decrees, that the property be sold by the master at public auction to the highest bidder for cash in the usual manner, etc., and that the master file his report of sale and distribution, etc.

And the present record discloses that on February 3, 1933, such report of sale and distribution was filed, from which it appears that complainant was the highest bidder at the sale held on January 16, 1933, that the property was sold to her for \$12,000, and that

there was a deficiency of \$3,409.99..

On the hearing before the master complainant testified in her behalf and she called as her witnesses her husband, Raymond Koenig; the defendant, Naif Nassar; and Carl H. Borak and Edward W. Wilshek, employees of the Cosmopolitan Bank. Two other employees of the bank, John P. Arens and Victor Jankowski gave testimony in its behalf. Certain documents and writings were introduced in evidence.

One of the contentions of counsel for complainant is in substance that the finding of the court in the decree (viz., that said principal note of \$1,000, and the two coupon notes aggregating \$360, all due on March 17, 1931, were "purchased," as distinguished from being "paid," by the Cosmopolitan Bank), contrary to the finding of the master in his report, is manifestly against the weight of the evidence. We cannot agree with this contention. While the evidence on this particular issue was conflicting, we are of the opinion, after a careful consideration of all the evidence, that the court's findings as contained in the decree as above set forth are sustained by a preponderance of the evidence.

Another of counsels' contentions is that "where there are several notes, secured by a trust deed, payable in installments at different dates, a person paying any notes prior or at maturity will be subrogated, in law, but not on a parity with the original holder of notes subsequently maturing." Under the evidence and the findings of the court based upon that evidence, we are unable to see wherein the doctrine of subrogation, or the adjudicated cases cited by counsel in support of their contention, are here applicable. And we think that the holdings of this court in the somewhat similar case of Reliance State Bank v. Zisook, 222 Ill. App. 610, can properly be referred to. We there said (pp.

There was a balance of \$2,400.00.

On the morning before the master's deposition, testified in her behalf and she called as her witnesses her husband, Raymond Koenig, the defendant, Will Koenig, and Carl E. Koenig and Edward J. Koenig, employees of the defendant bank. Two other employees of the bank, John J. Koenig and Victor Koenig gave testimony in the behalf. Certain accounts and receipts were introduced in evidence.

One of the confessions of counsel for complainant is in substance that the finding of the court in the case (viz., that said principal note of \$2,000, and the two coupon notes aggregating \$200, all due on March 15, 1914, were "outstanding," as distinguished from being "paid," by the defendant bank), contrary to the finding of the master in his report, is manifestly against the weight of the evidence. It cannot be said that the confession. While the evidence on this particular issue was conflicting, we are of the opinion, after a careful consideration of all the evidence, that the court's finding as contained in the decree is more in conformity with the weight of the evidence.

Master of court's confession is that "where there are several notes, secured by a trust deed, payable in installments at different dates, a person paying any note prior to its maturity will be no longer, in law, but not in a strictly technical original holder of notes subsequently maturing." Under the evidence and the findings of the court based upon that evidence, we are unable to see wherein the doctrine of subrogation, or the adjusted claims cited by counsel in support of their contention, are applicable. And we think that the findings of this court in the somewhat similar case of Reliance Trust Co. v. Bank of New York, 222 N.Y. 440, 110, are properly to be followed. We there said (pp.

612-13, italics ours):

"The bonds and coupons being payable to bearer, the title thereto passed with delivery to complainant on its paying therefor (citing authorities). The transaction amounted to complainant's purchase of the same, and did not lose its character as such merely because said bonds or coupons were first negotiated through the bank of complainant or its predecessor and were made payable thereat. They were not cancelled or marked paid. They still remained an obligation of the makers to whomever legally held them. Complainant was not, therefore, seeking relief on the theory of subrogation but as a valid bona fide holder and owner of such securities, and hence there is no reason for discussing the doctrine of subrogation." (See, also, Ketchum v. Duncan, 96 U. S. 659, 662-3; Anderson v. Pennsylvania Hotel Co., 56 Fed. Rep., 2nd, 980, 982.)

Our conclusion is that the decree of the circuit court of December 20, 1932, appealed from, should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

36722

THE PRESS COMPANY,
a corporation,
Appellee,

v.

HARRIS WRECKING COMPANY,
a corporation,
Appellant.

38 7

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 615⁴

MR. JUSTICE GRINLEY DELIVERED THE OPINION OF THE COURT.

In a 4th class action in contract, commenced on June 28, 1932, and tried without a jury on January 3, 1933, the court found the issues against defendant, assessed plaintiff's damages at \$542.38, and entered judgment against defendant in that sum. The present appeal followed.

In plaintiff's statement of claim it alleged in substance that its claim is for a balance of \$542.38, due under a written contract, dated August 19, 1931, for certain advertisements published in plaintiff's two newspapers at Albany, New York, on defendant's order at various times between August 10, 1931, and November 18, 1931, and that the total amount of the advertising, at the stipulated rate per line, is \$542.38 on which defendant made a partial payment on May 4, 1932, by check for \$300. Plaintiff also alleged that said balance was due to it under an account stated.

The written contract was signed in defendant's name by "A. Bresin, Supt." Defendant on the trial defended on the theories (1) that it did not authorize Bresin to sign the contract; (2) that when it was signed defendant was not a legally organized corporation, it not becoming such until October 17,

1931; and (3) that after its incorporation it did not ratify the contract.

After a careful examination of the oral and documentary evidence introduced upon the trial we are of the opinion that the court's finding and judgment were fully warranted. It is clearly disclosed that all the advertisements were ordered and published as ordered and that after the organization of defendant corporation it ratified and confirmed the contract by making a partial payment on account and by writing letters to the firm of attorneys, which represented plaintiff, wherein it promised to make payment of the balance but requested further time.

The judgment of the municipal court, appealed from, is affirmed.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

1931; and (2) that the corporation is not now
the contract.

After a careful examination of the oral and documentary
evidence introduced upon the trial we are of the opinion that the
court's finding and judgment were fully warranted. It is clearly
evident that all the allegations were proved and established
as stated and that the organization of defendant corporation
it ratified and confirmed the contract by making a partial payment
on account and by wiring letters to the firm of attorneys, which
represented plaintiff, wherein it promised to make payment of the
balance but postponed further time.
The judgment of the municipal court, appealed from,
is affirmed.

WITNESSES

Sullivan, W. J., and William, J., clerks.

36741

LUDWIG KITZENDORF, Administrator
of the estate of Mary Kitzendorf,
deceased,

Defendant in Error.

v.

PHILLIP COLLIER,

Plaintiff in Error.

WRIT TO MUNICIPAL
COURT OF CHICAGO.

273 I.A. 616

MR. JUSTICE WHITLEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to reverse an order or judgment, entered against him on February 15, 1933, by the municipal court (Judge O'Connell), in substance as follows: That defendant's set-off be stricken from the files (exception); that leave be given to plaintiff, to amend his statement of claim on its face instantly; that on plaintiff's motion judgment be entered "on the pleadings" against defendant in the sum of \$3,302, and that execution issue therefor (exception); and that defendant be allowed 60 days within which to file a bill of exceptions. On March 27, 1933, within apt time, defendant presented his bill of exceptions and the same was approved by the judge and filed. Such bill is contained in the transcript of the record. No appearance or brief has here been filed by plaintiff (defendant in error).

Plaintiff's first class action in assumpsit was commenced in the municipal court on June 8, 1931, and in his statement of claim as originally filed he alleged that on July 19, 1928, defendant, for a valuable consideration, executed and delivered to the payees his promissory note "which was thereafter assigned to Mary Kitzendorf, her heirs and assigns," as follows:

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U.S. DEPARTMENT OF AGRICULTURE

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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Am. Entomol. Soc. 1902. - Of which one hundred and thirty-five are affected as

— *any* will not be used for the following in 2/25/2000 edition for *any* = *no*

JAMES H. HARRIS

"\$3300

Chicago, Ill., July 19, 1928.

One after date I promise to pay to the order of
LUDWIG & MARY KITZENDORF thirty three hundred Dollars at
33rd & Archer Ave.

Value received with interest at the rate of 6% per cent
per annum.

(Signed) PHILLIP GOLLMER

No. 1. Due July 19, 1929."

And plaintiff further alleged that "there has been paid
on account by defendant the sum of \$500, leaving a balance due
thereon of the sum of \$2800," which with interest amounts to a
"total sum of \$3,284.00."

On July 20, 1931, defendant filed an affidavit of merits
and a statement of claim of set-off. In the affidavit of merits,
as a defense to plaintiff's claim, it is alleged:

"This defendant denies that, after allowing to him all
just credits, etc., he is indebted to plaintiff in the sum of
\$3,284, or any sum.

This defendant says that he has paid on the note men-
tioned in plaintiff's statement of claim the sum of \$700, and that
he is entitled to a set-off, as is shown by the claim of set-off
filed herewith, in a sum greater than the amount of plaintiff's
claim."

On August 6, 1931, defendant, by leave of court, filed
an amended statement of claim of set-off (accompanied by an affi-
davit of claim) in which it is alleged in substance that defend-
ant's claim is "for money loaned and advanced to said Mary
Kitzendorf during her life time," and for money expended by
defendant for her use and benefit and at her request, "in the
aggregate sum of \$5,000, all of which she promised to pay to this
defendant;" that said sum of \$5,000, as to dates and amounts is
itemized as follows: "August, 1922, - \$2,200; July, 1925, - \$1800;
June, 1926, - \$1,000;" that during June, 1927, said Mary Kitzendorf
again promised this defendant that she would pay the above sums;
and that during June, 1931, "Ludwig Kitzendorf agreed and promised
on behalf of the estate of Mary Kitzendorf to pay to defendant the
above mentioned sums."

1. The first part of the document is a letter from the President of the United States to the President of the Senate, dated January 1, 1901. The letter is signed by William McKinley and is addressed to Charles McNary. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States. The letter is a copy of a letter that was sent to the President of the Senate by the President of the United States.

and the following information was obtained from the records of the Bureau of the Census, Washington, D. C., for the year 1950:

COULD BE DIVIDED BY 1000 AND BE 1000 TIMES AS SMALL AS THE
ORIGINAL. THE DIVISION OF 1000 IS THE SAME AS DIVIDING BY 1000.

[illegible]

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

[illegible]

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation of the activities of the American Friends Service Committee in the Philippines.

FROM: [REDACTED] TO: [REDACTED] DATE: [REDACTED]

have mentioned above."

On August 14, 1931, the court (Judge Padden) overruled plaintiff's motion to strike defendant's said amended statement of set-off from the files, and gave leave to plaintiff to make defense thereto without filing an affidavit of merits.

The bill of exceptions discloses that on February 13, 1933, plaintiff, after notice to defendant's attorneys, appeared by his attorney and moved the court (Judge O'Connell) for a judgment against defendant "on the pleadings, less the sum of \$200, alleged by defendant to be further due to his credit;" that the attorneys for both parties were present; that after examination of all pleadings (as above set forth) the court, of its own motion, ordered stricken from the files defendant's said amended statement of set-off; that thereupon plaintiff, by his attorney, amended a part of his original statement of claim so that it read as follows: "That there has been paid on account by defendant the sum of \$700 (instead of \$500), leaving a balance due thereon of the sum of \$2600 (instead of \$2800)," together with interest, etc.; and that thereupon the court entered the order or judgment as first above mentioned.

After a careful consideration of the record we have concluded that the judgment should be reversed and the cause remanded for a trial upon the issues raised by the pleadings. We are of the opinion that it was error for the court to enter any judgment without a hearing on the merits, while defendant's affidavit of merits, denying any indebtedness, remained on file. (Menas v. Adinamis, 195 Ill. App. 92, 93; Barth v. Farmers, etc. Bank, 193 Ill. App. 318, 320; Lacker v. Young, 172 Ill. App. 255, 256-7; Kearney v. County of Cook, 137 Ill. App. 433, 436; Dalley v. Grand Lodge, 226 Ill. App. 164, 166; McDonnell v. Harter, 22 Ill. 29, 29; Mason v. Abbott, 83 Ill. 445, 446). And, as Judge Padden had by order

entered on August 14, 1931, overruled plaintiff's motion to strike defendant's amended statement of claim of set-off, we are further of the opinion that the court (Judge O'Connell), even if it might properly be considered that said pleading should be stricken, also erred in ordering the same stricken without first setting aside Judge Padden's said order, and in entering the judgment in question without first giving to defendant an opportunity of filing an amended statement of claim of set-off. (See Fort Dearborn Lodge v. Klain, 115 Ill. 177, 180-1; Dowie v. Priddle, 216 id. 553, 556.)

The judgment of the municipal court of February 15, 1933, is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

REVERSED AND REMANDED.

Sullivan, P. J., and Seanlan, J., concur.

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BARNEY FRANKLIN,
Complainant and Appellee,

v.

SAMUEL BERNSTEIN, JOSEPH L.
GILL, Clerk of the Municipal Court
of Chicago, and ALBERT J. HONAN,
bailliff of said court,
Defendants,

SAMUEL BERNSTEIN,

Appellant.

INTERLOCUTORY
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

273 I.A. 616²

MR. JUSTICE GRISLEY DELIVERED THE OPINION OF THE COURT.

On September 23, 1933, complainant filed his verified bill in the superior court of Cook county praying for the specific performance of an oral agreement theretofore made by him and the defendant Bernstein, and for a temporary injunction against defendants. Notice was given to them of an application for such an injunction, as prayed for in the bill, to be made before Judge Lindsey, one of the judges of said court. Defendants appeared by counsel and it was agreed that the hearing on the application be set for a future day. In the meantime the hearing on the application was assigned to Judge McGoerty, another judge of said court, and on October 2, 1933, the court (Judge McGoerty) granted leave to complainant to file amendments to the bill, and continued the hearing to October 4th, on which day complainant filed such amendments, consisting of the addition of certain words at different parts of the bill. And on the same day, October 4, 1933, the court issued the following temporary injunction order, against the

2700

BARNEY WILKINS,
Defendant and Plaintiff.

vs.

ALICE WILKINS, Plaintiff,
vs. BARNEY WILKINS, Defendant,
at Chicago, and County of Cook,
Illinois.

IN SENATE
JANUARY TERM
NINETEEN TWENTY
THREE

BARNEY WILKINS,

Plaintiff,

ST 81A. 616

vs. ALICE WILKINS, Defendant, in the County of Cook, Illinois.

On September 11, 1923, defendant filed his verified bill in the superior court of Cook County praying for the specific performance of an oral agreement that she made by him and his defendant husband, and for a temporary injunction against interference. Before the case was heard he applied for such an injunction, and moved for its issue to be made before Judge Lindsey, one of the judges of said court. Defendant appeared by counsel and it was agreed that the hearing on the application be set for a future day. In the meantime she heard on the application was assigned to Judge Lindsey, and on the 11th of September, and on October 4, 1923, the court (Judge Lindsey) granted leave to complainant to file amendments to the bill, and continued the hearing to October 11th, at which day complainant filed such amendments, consisting of the addition of certain words at the end of the bill. And on the same day, October 4, 1923, the court entered the following temporary injunction order, against the

three defendants, substantially as prayed, viz:

"That they do desist and refrain from in any manner further prosecuting said suit in forcible detainer in the municipal court of Chicago, case No. 2570111, or any other suit, to recover said premises from complainant, or disturbing complainant in his possession thereof, and from continuing to take from the conduit of complainant on complainant's premises any air from the Chicago Tunnel Co., used for conditioning the air in complainant's said restaurant, pendente lite, and until the further order of the court; and that the said five day notice and summons in forcible detainer are stayed accordingly, until the further order of the court. And it is further ordered that complainant file his cash bond in the sum of \$300 with the clerk of this court instantly, and the sum of \$300 on the 12th day of each and every month hereafter until the further order of the court."

On the same day (October 4th) the usual complainant's injunction bond in the sum of \$300, approved by the court, was filed and the injunction writ was served on all defendants. On the same day, also, Bernstein moved to dissolve the injunction, on the ground that "there is no equity on the face of the bill." The motion was continued until October 16, 1933, on which day, on the hearing of the motion, complainant was given leave to file an amended bill within six days "without prejudiced to the temporary injunction heretofore entered herein;" and the court ordered that "the motion to dissolve the temporary injunction is hereby denied."

On October 18, 1933, within apt time and in accordance with the provisions of section 123 of the present Practice Act, Bernstein filed his appeal bond with the clerk of the superior court, which was approved by that official, praying an appeal to this appellate court from the order of October 4th, granting the injunction, and on October 31, 1933, also within apt time, filed the clerk's transcript of the record in this court. On November 7, 1933, complainant (appellee) here filed a written motion suggesting a diminution of the record and asking leave to file an additional transcript of the record. The motion was granted and on that day complainant filed such additional transcript, which is complainant's amended bill of complaint, filed by leave of the

superior court on October 21, 1933, (i.e., 17 days after the superior court had entered the order granting the temporary injunction now in question, and 3 days after Bernstein had perfected the present appeal from said order.)

In complainant's original bill as amended (upon which the injunction order of October 4, 1933, in question, was entered), it is alleged in substance:

That about May 1, 1933, the defendant, Bernstein, was in possession of certain premises known as 12 N. Clark street, Chicago; that prior thereto one Harding, under lease from Bernstein, had occupied and used the basement of said premises as a restaurant; that about May 1, 1933, Harding abandoned said basement (hereinafter called the premises), "for the supposed reason that a restaurant at said location could not be conducted at a profit," and left the premises on Bernstein's hands, "subject, however, to Harding's right to remove the fixtures, - he holding the same at a value of \$5,000;" that thereupon, because of complainant's experience and ability, Bernstein solicited and "insistently urged" complainant to continue a restaurant business on the premises; that complainant consented to do so and about May 1, 1933, he and Bernstein made a verbal agreement; and that it was mutually agreed between them in substance as follows: That complainant, "acting as agent for Bernstein," should obtain said fixtures from Harding and leave them on the premises; that Bernstein "should recondition the premises and deliver possession thereof to complainant in a condition suitable to proceed in the conducting, under complainant's sole control, of a restaurant;" that complainant at his expense should provide all operating utensils and appliances, pay the gas bills and pay to Bernstein for the electric lighting; that complainant should be given possession of the premises "without payment of rent until such time as the business should show a reasonable profit;" and that thereafter complainant "should have a written lease, in the usual form of provisions, for five years at a rental of \$300 per month for the first three years and \$400 per month for the next following two years, with privilege of renewal."

That in pursuance of the agreement Bernstein, on or about May 1, 1933, let complainant into possession of the premises and complainant entered into the performance of his part of the agreement; "made a deal with Harding whereby he obtained the fixtures for \$2,000, thereby saving Bernstein \$3,000, and left the fixtures on the premises;" procured the necessary tables, chairs, utensils and appliances "at an expense of about \$5,000;" and thereafter with all due diligence began to conduct and manage a restaurant business on the premises and continued to do so, "without the payment of any rent," down to "about a week before the filing of this bill (filed September 25, 1933), at which time occurred the first showing of any profit." That the business "did not prior thereto produce a profit but showed a loss aggregating upwards of about \$5,000, in addition to which complainant, during said time, made contracts, thereby obligating him for future performance and payment of moneys amounting to about \$2,000."

That while complainant was operating the restaurant during

the summer and when the weather was extremely hot, Bernstein, without complainant's consent, clandestinely and unlawfully, "tapped the air conduit," which conveyed cool air from the Chicago Tunnel Co. to the restaurant and which cool air was necessary during hot weather for the comfort of patrons and to attract their patronage, and thereby diverted from the restaurant "more than one-half of the cool air allotted to the restaurant," and "took, stole and used the same to condition the air in the upper stories of his building, not a part of the restaurant;" that the Tunnel Company had refused to give Bernstein any cooled air for said upper stories, but that complainant had obtained from it sufficient cooled air for the restaurant; that by reason of said tapping, etc., the air in the restaurant was insufficiently cooled, many patrons complained of excessive heat, and complainant lost much patronage and good will and suffered losses; and that when complainant complained to Bernstein of said tapping etc., the latter threatened to oust complainant from the restaurant and stated that it would not be long before this would be done.

That about the middle of September, 1933, and when the restaurant first showed that it was running at a profit, complainant offered to begin paying to Bernstein the \$300 monthly rental as provided in said verbal agreement, and tendered \$300 to him, but that he refused the tender; and that he, "because of said showing of profit, now seeks to possess himself of the premises and restaurant business, to the exclusion of complainant therefrom, and to complainant's loss of about \$12,000, so invested as aforesaid."

That in furtherance of his intent to deprive complainant of the restaurant business, Bernstein, on September 18, 1933, filed in the municipal court of Chicago a complaint in forcible detainer against complainant, Case No. 2570111, alleging that he was entitled to the possession of the premises and that complainant unlawfully withheld such premises, which allegations were "wholly false and untrue and designed to injure and defraud complainant;" that summons in the forcible detainer suit, returnable on September 25, 1933, has been served upon complainant, requiring him to appear and defend, etc.; and that prior to the beginning of said suit Bernstein served upon complainant a "Landlord's Five Day Notice," alleging therein that complainant is indebted to him for rent for the premises in the sum of \$3,203.64, which allegation is false and untrue and contrary to the oral agreement above stated.

That Bernstein's actions as above set forth "are contrary to equity and good conscience and tend to the manifest prejudice and injury of complainant," who now here offers to do whatever in equity and good conscience the court may deem right and proper; that if Bernstein be permitted to pursue the suit in forcible detainer he will cause complainant to be ousted from the premises and to lose his investment in said restaurant business; and that unless Bernstein is restrained from further prosecuting the forcible detainer suit and is required to specifically perform said verbal agreement, complainant will suffer irreparable injury, etc.

We have read the amended bill, filed by complainant in the superior court on October 21, 1933, and which is contained in the additional transcript here filed. It does not change the object for which the bill was filed or ask for different relief

than as asked in the original bill. It only alleges the same facts in a more elaborate manner. Hence, it cannot be said that the injunction, as granted on the face of the original bill, was rendered ineffective by the filing of the amended bill. (Court Case No. 12, Foresters of America v. Cerna, 275 Ill. 605, 611; Craig v. Craig, 173 Ill. App. 176, 178.) But counsel for complainant, as appears from their brief here filed, seems to be under the impression that, because the allegations of the amended bill make a stronger case on its face for the granting of the temporary injunction than did the original bill, said amended bill should be considered by this court on the present appeal. Inasmuch as the temporary injunction order was granted on the face of the original bill and entered on October 4, 1933, and the present appeal from that order was perfected by Bernstein three days before said amended bill was sworn to and filed, we are of the opinion that counsel's impression is an erroneous one. (See Mechanic's, etc. Association v. People, ex rel. etc., 72 Ill. App. 160, 170; Reynolds v. Ferry, 11 Ill. 534, 535; Merrifield v. Cottage Piano Co., 235 Ill. 526, 532.)

The main contention of counsel for Bernstein, in urging a reversal of the interlocutory injunction order appealed from, is that the verified allegations of the original bill are insufficient to warrant the entry of such an injunction pendente lite. After a careful reading of the bill we cannot agree with the contention. And we do not think that, as argued by defendant's counsel, the statute of frauds (the lease to be made for five years under the verbal agreement when the running of the restaurant became profitable) is here applicable or should militate against the granting of an injunction, pendente lite. Even if the statute might be considered applicable, it is well settled that such statute should not be allowed to be used as an "engine of fraud." (Union etc.

Ins. Co. v. White, 106 Ill. 47, 73; or "invoked to perpetrate a fraud." (Wilke v. Miller, 171 Ill. 556, 562.)

And we do not think that there is any substantial merit in the further contention of Bernstein's counsel that the original bill does not set out such a verbal agreement as is sufficiently binding upon both Bernstein and complainant.

Our conclusion is that the interlocutory injunction order of October 4, 1933, appealed from, should be affirmed and it is so ordered.

AFFIRMED.

Sullivan, P. J., and Scanlan, J., concur.

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36490

MAX RODNICK,
Plaintiff in Error,

v.

HARRY TUVESON,
Defendant in Error.

ERROR TO SUPERIOR COURT

OF COOK COUNTY.

273 I.A. 616³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an action on the case to recover damages for personal injuries sustained by plaintiff as the result of his being struck by an automobile driven by defendant. The jury returned a verdict for defendant.

The declaration originally consisted of six counts, but plaintiff withdrew the fourth, fifth and sixth counts, which charged wilful and wanton negligence. The first, second and third counts were negligence counts. Plaintiff's theory was "that he was struck by the automobile operated by the defendant while he was crossing Wells Street from west to east on the north cross-walk of Adams Street, at a point about midway between the rails of the south-bound street car track on Wells Street; that at the time of the accident, plaintiff was walking with the east-bound traffic, the signal lights being green for east and west traffic. Plaintiff contends that as he left the west curb on Wells Street and walked east, defendant's automobile approached from the north and ran him down without sounding any horn or giving any signal of approach, and without checking its speed or endeavoring to stop or turn out to avoid striking him; that as he left the west curb and walked east on the cross-walk, the automobile of defendant was about fifty feet north of the cross-walk over which plaintiff was walking." Defendant's theory was

WILLIAM J. HARRIS,
Plaintiff in Error.

v.

HARRY TUNNICLIFFE,
Defendant in Error.

IN SENATE

OF THE DISTRICT OF COLUMBIA.

22230

THE JUSTICE OF THE PEACE FOR THE DISTRICT OF COLUMBIA.

This is an action on the part of the plaintiff for personal injuries sustained by him on the 10th of May, 1904, being struck by an automobile driven by defendant. The jury returned a verdict for defendant.

The action originally commenced at the county, but plaintiff withdrew the fourth, fifth and sixth counts, which charged with and under negligence. The first, second and third counts were negligence counts. Plaintiff's theory was that he was struck by the automobile operated by the defendant while he was crossing the street from west to east on the north crosswalk of Adams Street, at a point about midway between the rails of the south-bound street car track on Adams Street; that at the time of the accident, plaintiff was walking with the east-bound traffic, the signal lights being green for east and red for west. Plaintiff contended that as he left the west side on Adams Street and walked west, defendant's automobile approached from the north and ran him down without sounding any horn or giving any signal of approach, and without checking its speed or attempting to stop or slow down to avoid striking him; that as he left the west side and walked east on the crosswalk, the automobile at defendant's wheel left the north of the crosswalk over which plaintiff was walking. Defendant's theory was

"that the plaintiff ran when the lights were against him, from the northwest corner of the intersection of Wells and Adams streets toward the southeast corner, when the defendant's automobile was so close that the defendant, driving it, was unable to stop before the plaintiff was struck; that there was no evidence that defendant's automobile was being operated at a high rate of speed."

Plaintiff contends that the verdict is against the manifest weight of the evidence and that therefore the trial court erred in not granting his motion for a new trial. After a careful consideration of the evidence we have reached the conclusion that there is no merit in this contention.

Plaintiff next contends that "the court erred in giving to the jury defendant's instructions numbered 2, 3, 4 and 5." This contention is argued upon the assumption that the case went to the jury upon the three counts that charged negligence, and also upon the sixth count, which charged wilful, wanton and gross negligence, and plaintiff contends that the instructions were erroneous because they were based upon the theory that plaintiff could not recover if he was guilty of negligence that proximately contributed to his injuries. We are somewhat surprised that plaintiff should make this contention, in view of what transpired at the conclusion of plaintiff's case. The bill of exceptions shows the following, which was omitted from plaintiff's abstract: "(The following proceedings were then had in Chambers, out of the hearing and presence of the jury.) * * * The Court: The fourth, the fifth and the sixth counts are all wanton and wilful counts. Mr. Bloomington (attorney for plaintiff): Are they? Well, let's see. The Court: The first, second and the third are the negligence counts. The last three are wanton and wilful counts, every one of them. (Discussion.) Mr. Bloomington: If the record will show, then, that

those counts are withdrawn from the consideration of the jury? The Court: Plaintiff withdraws the fourth, fifth and sixth counts, which are the wanton and wilful counts, and after that is done the Court will deny a motion to direct a verdict as to the remaining counts." That plaintiff withdrew the wilful and wanton counts is further borne out by the fact that defendant requested peremptory instructions as to the first, second and third counts only. Moreover, plaintiff gave no instructions bearing upon wilful or wanton conduct and the first two instructions given to the jury at his request are based upon the theory that plaintiff was required to exercise ordinary care. The same is true as to the instructions bearing upon damages, given at plaintiff's request. While it is true that the common law record does not show that the sixth count was withdrawn, nevertheless, in view of what actually occurred in the matter of the counts, plaintiff is not justified in making the instant contention.

We find no merit in the contention of plaintiff that the court erred in giving to the jury, at the request of defendant, instructions numbers five and seven.

Plaintiff also contends that the court erred in submitting to the jury, at the request of defendant, instruction number twelve. It is sufficient to say, in answer to this contention, that this instruction bears solely upon the question of damages, and as the jury found for defendant it is evident that it could not have prejudiced plaintiff.

Plaintiff contends that the trial court made improper remarks to the counsel for plaintiff in the presence and hearing of the jury, which were prejudicial to plaintiff's rights and deprived him of a fair and impartial trial. After a very careful consideration of the record we have reached the conclusion that

these counts are withdrawn from the consideration of the jury. The Court: Plaintiff withdraws the fourth, fifth and sixth counts, which are the motion and still count, and after that is done the Court will deny a motion to dismiss a verdict as to the remaining counts." That plaintiff withdrew the fifth and sixth counts is further borne out by the fact that defendant requested jury-empower instructions as to the third, second and third counts only. Moreover, plaintiff gave no instructions bearing upon fifth or sixth counts and the third two instructions given to the jury at his request are based upon the theory that plaintiff was required to exercise ordinary care. The same is true as to the instructions bearing upon defendant's request. While it is true that the common law rule does not show that the sixth count was withdrawn, nevertheless, in view of what actually occurred in the matter of the fourth, plaintiff is not justified in making the instant contention.

He finds no merit in the contention of plaintiff that the Court tried in giving to the jury, at the request of defendant, instructions numbered five and seven.

Plaintiff also contends that the Court tried in refusing to the jury, at the request of defendant, instruction number twelve. It is sufficient to say, in answer to this contention, that this instruction bears solely upon the question of damages, and as the jury found for defendant it is evident that it could not have prejudiced plaintiff.

Plaintiff contends that the trial court made improper remarks to the counsel for plaintiff in the presence and hearing of the jury, which were prejudicial to plaintiff's rights and deprived him of a fair and impartial trial. After a very careful consideration of the record we have reached the conclusion that

counsel for plaintiff has no just grounds for complaining of the treatment he received at the hands of the trial court. The case was tried by one of the oldest and most experienced judges in this county. We find that counsel's general attitude toward the attorneys for defendant and the trial court is, as defendant argues, subject to just criticism. Plaintiff's counsel repeatedly ignored the court's rulings and persisted in asking questions to which the court had sustained objections. His manner toward the trial court, at times, was most provocative, and on several occasions it was impertinent and contemptuous. To illustrate: After the court had told counsel not to repeat certain questions, Mr. Bloomington said: "Well, between counsel and the court I don't seem to have much chance to get in any - much evidence here." Plaintiff's counsel also accused one of defendant's attorneys, whom he designated as "that little fat man," of "running out ever since this case has been going on, telling what happened in the courtroom;" and in questions put to a witness he charged, in effect, that one of defendant's counsel was running out of the courtroom and telling the witnesses who had not testified "what the other witnesses testified to." In Chicago City Ry. Co. v. Shaw, 220 Ill. 532, 536-7, the court said:

"The next contention is, that the court erred in making improper and unnecessary remarks throughout the entire trial, which were prejudicial to the appellant. After a careful examination of the record upon these questions, we think that while the court unnecessarily made remarks that were not entirely proper, yet to a great extent, if not altogether, the remarks were caused by the persistency of counsel for appellant in trying to get evidence before the jury which was highly improper and which had been refused by the court, and by commenting upon rejected evidence in his argument to the jury. The record shows that when evidence was offered by counsel for appellant and objection made thereto, or when objection was made by him to evidence offered by appellee and the court ruled adversely to the contention of appellant, counsel for appellant would enter into a controversy with the court as to the propriety of his ruling, and in many instances in matters that

were clearly improper he would evade the ruling made by the court by dividing the subject matter of the objectionable evidence into various parts and offer them separately; also that counsel for appellant, in his argument to the jury, undertook to discuss evidence that had been excluded by the court, among which was the verdict of the coroner's jury as to the cause of the death of the motorman, who was killed in the same accident, and attempted to argue to the jury that that verdict would show where the blame lay, and to this the court sustained an objection. This course of appellant's counsel seems to have exasperated the court and to have called forth remarks that might be regarded as strictures upon counsel. It is the duty of the court to avoid making remarks that may in any degree reflect upon counsel, but it is not always reversible error if the remarks are justified by the conduct of counsel against whom they are directed. It is the duty of counsel to submit to the rulings of the court, and if he persists in a course that is clearly in violation of his duty, the court must be allowed some discretion in preserving order and commanding respect to his rulings. From a careful examination of this record, while we do not wholly justify the court, we are satisfied that there was much provocation, and that the remarks were not of such a character as showed, in any degree, the views of the court as to the merits of the case or tended to show any views in favor of either party to the cause, and would not be so understood by the jury, and we think the verdict should not for that reason be set aside."

In Forest Preserve Dist. v. Barchard, 293 Ill. 556, 563, the court said:

"Counsel for appellants also argue that the court's criticism of such counsel, frequently made during the trial, was unnecessary and unjust and tended to prejudice their clients' interests in the minds of the jury. While we are of the opinion that some of the remarks of the court were somewhat pointed, we are forced to the conclusion from the record itself that counsel for appellants had so disregarded their proper attitude towards the court that the court was justified in its criticism."

We believe that what the Supreme court has said in these two cases is peculiarly applicable to the instant contention. While the trial court upon two occasions used expressions that were not entirely proper, nevertheless, they referred only to the conduct of the counsel and they did not tend, in any degree, to indicate that the court had any opinion touching the merits of the case. After a careful study of the entire record we are surprised that the trial court, in the several situations, kept his temper as well as he did.

Plaintiff contends that the trial court arbitrarily refused to permit counsel for plaintiff to make an offer of proof, either within or without the presence and hearing of the jury. There is not the slightest merit in this contention. When plain-

tiff's counsel asked leave to make an offer of evidence the court ruled that he would not allow the offer to be made in the presence of the jury but that he would allow the counsel to make the offer later. That the court was entirely correct in holding that he would not allow the offer to be made in the presence and hearing of the jury, see Crystal Lake Park Dist. v. Consumers Co., 313 Ill. 395, 405. As bearing upon the contention that plaintiff now urges, we may add that counsel did not see fit to later make an offer of proof.

While we think there may be some merit in the contention of plaintiff that the court erred in striking out the answer of the witness Russo that he had asked defendant how the accident happened and defendant's answer was that he "did not see the party," nevertheless, we are satisfied that this error, if it be one, is not sufficient to warrant a reversal of the judgment.

Plaintiff contends that the trial court improperly limited the cross-examination of defendant's witnesses. We find no merit in this contention.

After a painstaking consideration of the record and the contentions raised by plaintiff, we have reached the conclusion that he has had a fair trial and that the judgment of the Superior court of Cook county should be affirmed, and it is, accordingly, so ordered.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

111's counsel asked leave to call on him as witness the court
 ruled that he would not allow the other to be made in the presence
 of the jury and that he would allow the counsel to make the offer
 later. That the court was in error in ruling that he
 would not allow the offer to be made in the presence of the jury.
 The jury, see Griffin v. State, 111 Ill. 355.
 111's counsel upon the objection that he would not allow the
 offer and that counsel did not see fit to later make an offer of proof.
 While we think there may be some merit in the contention
 of plaintiff that the court acted in ruling and the matter of the
 witness that he had asked a question how the witness happened
 and defendant's answer was that he "did not see the party," never-
 theless, we are satisfied that this error, if it be one, is not
 sufficient to warrant a reversal of the judgment.
 Plaintiff contends that the trial court improperly limited
 the cross-examination of defendant's witnesses. We find no merit in
 this contention.
 After a painstaking examination of the record and the
 contentions raised by plaintiff, we have reached the conclusion that
 he has not a fair trial and that the judgment of the superior court
 of Cook County should be affirmed, and it is so respectfully so
 ordered.
 WILLIAM P. ELLIS and GEORGE J. J. CONNELLEY

36511

CHARLES E. GRAYDON, for use of
MAX WHEER, doing business as
Motor Car Service Co.,
(Plaintiff) Defendant in Error,

v.

LOUIS DINATO, FLORENCE M. DANFORTH
and LEON C. DANFORTH,
Defendants.

ERROR TO
SUPERIOR COURT,
COOK COUNTY.

FLORENCE M. DANFORTH and
LEON C. DANFORTH,
(Defendants) Plaintiffs in Error.

273 I.A. 616⁴

MR. JUSTICE SCAGLAN DELIVERED THE OPINION OF THE COURT.

This is an action in debt on a replevin bond given to defendant in error, Charles E. Graydon, sheriff of Cook county (hereinafter called the plaintiff), by plaintiffs in error. The case was tried by the court and there was a finding in favor of plaintiff and his damages were assessed at the sum of \$4,000. In this court a judgment of severance as to Louis Dinato, defendant, was entered and leave granted Florence M. Danforth and Leon C. Danforth, defendants, to prosecute this writ of error alone.

The following are the only contentions raised by plaintiffs in error (hereinafter called the defendants) in the original brief:

1. "The declaration failed to set up a cause of action and the Court did not have jurisdiction."
2. "The judgment for the return of the property is satisfied by the delivery or a proper tender."
3. "Findings and judgment of the Court are against the manifest weight and not supported by the evidence."

As to the first point: The declaration consists of

RECEIVED BY THE DIRECTOR OF THE BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C.
JANUARY 10, 1934

TO THE DIRECTOR OF THE BUREAU OF INVESTIGATION
FROM THE ATTORNEY GENERAL
RE: [illegible]

YOUR LETTER OF JANUARY 8, 1934, IS RECEIVED.
THE FOLLOWING IS THE OFFICIAL RECORD OF THE PROCEEDINGS
OF THE BOARD OF INVESTIGATION HELD AT WASHINGTON, D. C., ON
JANUARY 7, 1934.

OFFICIAL RECORD OF THE PROCEEDINGS OF THE BOARD OF INVESTIGATION

THIS IS AN OFFICIAL RECORD OF THE PROCEEDINGS OF THE BOARD OF INVESTIGATION HELD AT WASHINGTON, D. C., ON JANUARY 7, 1934. THE BOARD WAS COMPOSED OF THE ATTORNEY GENERAL, THE DIRECTOR OF THE BUREAU OF INVESTIGATION, AND THE CHIEF OF THE DIVISION OF INVESTIGATION. THE BOARD WAS CALLED TO ORDER AT 10:00 A. M. BY THE ATTORNEY GENERAL. THE FIRST BUSINESS OF THE BOARD WAS THE READING OF THE REPORT OF THE DIVISION OF INVESTIGATION ON THE MATTER OF THE ALLEGED VIOLATION OF THE PROVISIONS OF THE ACT OF MARCH 2, 1907, RELATIVE TO THE REGISTRATION OF FOREIGN DISSENTS. THE REPORT WAS READ BY THE CHIEF OF THE DIVISION OF INVESTIGATION. THE BOARD THEN DISCUSSED THE MATTER AND MADE THE FOLLOWING FINDINGS: [illegible]

THE BOARD THEN DISCUSSED THE MATTER AND MADE THE FOLLOWING FINDINGS: [illegible]

1. The Division of Investigation is not up to the standard of efficiency and economy which is required of it.
2. The Division of Investigation is not up to the standard of efficiency and economy which is required of it.
3. The Division of Investigation is not up to the standard of efficiency and economy which is required of it.
4. The Division of Investigation is not up to the standard of efficiency and economy which is required of it.

one count, and attached to it is a copy of the replevin bond, which is marked "Copy of Instrument sued on." The contention of defendants that this copy of the instrument forms no part of the declaration and cannot be made so by reference thereto is conceded by plaintiff, but he contends that the bond sued on was set forth in the declaration in its legal effect and that, under the authorities, when the instrument is set out in substance, or according to its legal effect, it need not be pleaded verbatim. That such is the established rule of pleading cannot be questioned. The declaration sets out, in substance, that on July 19, 1928, Dinato filed his replevin action in the Superior court, entitled Louis Dinato v. Max Weber, doing business as Motor Car Service Company, a corporation, and that the writ of replevin issued, directed to the sheriff of Cook county, commanding him that if Dinato should give a bond to him, with good and sufficient security, to prosecute the said suit to effect, without delay, and to make return of the said goods and chattels, if return thereof should be awarded, and to save and keep harmless such sheriff in replevying the said goods and chattels, then such sheriff should without delay replevy and deliver to Dinato the goods and chattels which the said Weber took and unjustly detained, etc.; "and thereupon the plaintiff, so being such sheriff as aforesaid, took from the said Louis Dinato, and from the said Florence M. Danforth and Leon C. Danforth as good and sufficient sureties, bond in double the value of the said goods and chattels so about to be replevied; and on that occasion they, the said Louis Dinato, Florence M. Danforth and Leon C. Danforth, then and there by their writing obligatory, commonly called a replevin bond, bearing date of the day first aforesaid, did jointly and severally acknowledge themselves to be held and firmly bound unto the plaintiff, so

being such sheriff as aforesaid, in the sum of \$10,000, above demanded, to be paid to the plaintiff; which said writing obligatory was and is subject to a certain condition thereunder written, to the effect that if the said Louis Dinato should prosecute his said suit to effect, and without delay, and should make return of the said goods and chattels, if return thereof should be awarded, and should save and keep harmless the plaintiff, so being such sheriff as aforesaid, in replevying the said goods and chattels, then the said writing obligatory was to be void, otherwise to remain in full force; as by the said writing obligatory and the said conditions thereof, remaining affixed in the said court, will appear." The declaration further alleges that the sheriff, by virtue of the replevin writ, replevied from Weber and made deliverance of the said goods to Dinato, as by the writ plaintiff was commanded; "and the plaintiff in fact says, that the said Louis Dinato did not prosecute his said suit to effect, but therein wholly failed and thereupon afterwards, in the said March term, 1930, of the said court, it was considered by the said court that the said Louis Dinato should take nothing by his said writ, and that the said Max Weber, doing business as Motor Car Service Company, should go thereof without day, and should have a return of the said goods and chattels; and the plaintiff further in fact says, that the said Louis Dinato did not make a return of the said goods and chattels, but hitherto refused, and still refuses, so to do; whereby an action has accrued to the plaintiff to demand of the defendants, for the use aforesaid, the sum of \$10,000 above demanded. * * * There was no demurrer filed to the declaration. The bond was introduced in evidence. The sole question before us is, is the declaration sufficient, after verdict and judgment? We are satisfied that this question must be

answered in the affirmative.

As to the second contention of defendants plaintiff says that tender must be specially pleaded and no such special plea was filed by them. They seek to avoid the effect of this rule of pleading by contending that they introduced, without objection, evidence of tender, and that plaintiff is therefore "bound by the effect of this evidence." In support of this position defendants cite the evidence of John Marilio, who testified that he was acquainted with Minato and took a ride with him in a Hollis Royce automobile, and that during the ride they went to the place of business of Weber, where Minato and Weber had a conversation, and counsel for defendants stated to the court that they wished to prove that Minato offered to return the car to Weber. The following then occurred: "Mr. Baumgartner (attorney for plaintiff): There is no issue on any plea like that. There is only one plea and that is the question of ownership. There is another plea of nul tiel record which cannot be filed in an action of debt. There must be a special plea of tender. The Court: No question about that. I will sustain the objection." Later, in the testimony of this witness, the following occurred: "Mr. Adams (attorney for defendants): Q. Was anything said about the question of the value of this automobile in your presence between these two men? Mr. Baumgartner: I object to that, that wouldn't be competent as to value, the conversation between the two men. Mr. Adams: Wouldn't Weber be bound by his own statements? The Court: He may answer. A. Not about any value. Minato says 'I paid you close to \$3000. with the suits and everything that I made for you.' He says 'the car ain't worth any more than that, if you want the car it is outside here, you can have your car.' Mr. Baumgartner: I object to

answered in the affirmative.

It is the second question of the committee.

They first asked me if I had been asked to give evidence in the trial of the man who was shot by the police.

They then asked me if I had been asked to give evidence in the trial of the man who was shot by the police.

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that. The Court: That may stand." The trial court did not thereby change his former ruling that evidence of tender was not admissible under the pleadings, and he seems to have permitted this last testimony to stand upon the theory that it had some bearing upon the value of the car. But even if the evidence of the alleged tender could properly be considered, it was entirely insufficient to prove tender.

"Tender to be sufficient must be an unconditional offer to return the property. * * * Not only must plaintiff return the property to satisfy the condition and judgment for a return, but the property must ordinarily be returned in substantially the same condition in which it was replevied, or in like good order and condition, even though the latter requirement is not inserted in the judgment." (54 C. J., p. 437.)

Moreover, this case was tried by the court, and under the established rule we must presume that the court considered only competent evidence in reaching a decision, especially as there is sufficient proper evidence in the record to justify the judgment.

After a careful consideration of the facts and circumstances bearing upon the third contention of defendants, we are satisfied that it is without merit.

The judgment of the Superior court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Drisley, J., concur.

1. The first thing I noticed when I stepped out of the plane was the cold. It was a sharp contrast to the warm, humid air of the tropics. I had heard that the weather in the north was harsh, but I didn't realize just how cold it would be. The wind was biting, and the sun felt like a distant star. I wrapped my coat around myself and tried to ignore the shivers running down my spine. The ground beneath my feet was a mix of snow and ice, and the trees were bare and skeletal. It was a stark, beautiful landscape, but it felt like I had been thrown into a different world. I took a deep breath and tried to steady myself. This was my chance to see the world from a new perspective, to experience something I had never before. I was here, in the heart of the north, and I was going to make the most of it. I looked up at the sky and saw a few birds flying in the distance. They seemed so small and fragile against the vast, open sky. I felt a sense of awe and wonder, a sense of being part of something much larger than myself. I was here, in the heart of the north, and I was going to make the most of it.

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years. It is a fact which has been recognized by the government and the people for many years.

...the fact that the ...
...the fact that the ...

There is a general impression of the fact that the
American people are not yet fully conversant with the
situation in the world.

SECRET

* 1980-81, 1981-82, 1982-83, 1983-84, 1984-85, 1985-86, 1986-87

36668

CORNELIA BUILDING CORPORATION,
a corporation,

Appellant,

v.

HARRY BLUM,

Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 617¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment by confession against defendant in the sum of \$582. Thereafter, upon motion of defendant, supported by his verified petition, he was given leave to appear and defend, the judgment to stand as security. The cause was tried by the court and the issues were found against plaintiff. He appeals from a judgment entered upon the finding.

The statement of claim alleges that defendant, on May 20, 1927, executed a lease for a certain apartment in the Cornelia Apartments, in Chicago, as lessee, by which he agreed to pay plaintiff, as lessor, a monthly rental of \$350, in advance, for the period commencing May 1, 1927, and ending April 30, 1932, and that there was due and owing to plaintiff from defendant a monthly balance of \$100 for each of the months of December, 1931, and January, February, March and April, 1932, together with the sum of \$82.50 for attorney's fees. Defendant's petition averred, inter alia, that he had in all respects performed the covenants of the lease and paid all rentals therein stipulated until November 30, 1931, "and that prior to the date aforesaid your petitioner entered into an oral agreement with plaintiff, by and through its authorized officers and agents,

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Applicant,

v.

JOHN W. WILSON,

Respondent.

ALBANY, NEW YORK

COURT OF APPEALS

276 A. 2d

IN SENATE JANUARY 10, 1967

Applicant recovered a judgment by confession rendered
defendant in the sum of \$500. Defendant, who motioned to
set aside, supported by his verified petition, he was given
leave to appear and defend, the judgment to stand as a nullity.
The cause was tried by the court and the facts were found
against plaintiff. He appeals from a judgment entered upon
the finding.

The statement of claim alleges that defendant, on

May 2, 1937, executed a lease for a certain apartment in the
Columbia apartment, in Albany, as tenant, of which he agreed
to pay plaintiff, as landlord, a monthly rental of \$50, in

advance, for the period commencing May 1, 1937, and ending

April 30, 1938, and that there was due and owing to plaintiff

from defendant a monthly balance of \$50 for each of the months
of December, 1937, and January, February, March and April, 1938,

together with the sum of \$25.00 for attorney's fees, to-wit:

and a petition avowed, John W. Wilson, that he had in all respects

performed the covenants of the lease and paid all rentals therein
specified until November 30, 1937, and that prior to the date

whereof said plaintiff entered into an oral agreement with

plaintiff, by and through the undersigned attorney and counsel,

whereby the rental of \$350.00 per month, as in said lease stipulated, was reduced to the sum of \$250.00 per month, for the months of December, 1931 and * * * January, February, March and April, 1932. And that your petitioner pursuant to the agreement aforesaid, paid to plaintiff the sum of \$250.00 per month in full payment of rentals due for the months of December, 1931 and January to April, both inclusive, 1932; and that plaintiff accepted the said sum of \$250.00 for the months aforesaid as payment in full for any and all rentals due under the lease."

Plaintiff contends that "defendant failed to sustain burden of proof to establish an oral agreement." In our consideration of the instant contention we have read the short bill of exceptions, and after a careful consideration of the facts and circumstances bearing upon the question of the alleged oral agreement we are satisfied that we would not be justified in disturbing the finding of the trial judge in reference thereto. He had a better opportunity than we to observe the witnesses and to determine the weight, if any, that should be given to their testimony, and if he believed defendant's testimony, as he apparently did, he was obliged to find for him. Defendant testified that he made the oral agreement with John J. Murphy, who appears to have been the treasurer and president of plaintiff corporation, and plaintiff conceded, during the trial, that Murphy had the authority to make such a contract. Murphy testified that the monthly payments of \$250 were by way of "temporary relief" and that the same arrangement was extended to the other tenants; "they could pay all but \$100, to go on and bill them monthly for the difference and then at the expiration of their lease in a number of cases we have so done, in granting a reduction we have made the arrangement so that

whereby the rent of \$100.00 per month, as in this lease stipulated, was reduced to the sum of \$50.00 per month for the months of December, 1933 and * * * January, February, March and April, 1934. And that your petitioner pursuant to the agreement aforesaid, paid to defendant the sum of \$100.00 per month in full payment of rentals due for the months of December, 1933 and January to April, both inclusive, 1934; and that defendant accepted the said sum of \$100.00 for the months aforesaid as payment in full for any and all rentals due under the lease. Plaintiff contends that defendant failed to maintain burden of proof to establish an oral agreement. In our opinion of the facts and evidence we have read the facts, all of exceptions, and after a careful consideration of the facts and circumstances bearing upon the question of the alleged oral agreement we are satisfied that we would not be justified in disturbing the finding of the trial judge in reference aforesaid. We had a better opportunity than we to observe the witnesses and to determine the weight, if any, that should be given to their testimony, and it is believed defendant's testimony, as he appears to have been the defendant with John J. Murphy, who appears to have been the defendant and president of defendant corporation, and plaintiff contended, during the trial, that Murphy had the authority to make such a contract. Murphy testified that the monthly payments of \$50.00 were by way of "temporary relief" and that the same arrangement was extended to the other tenants; "they could pay all but \$100.00 to go on and still then monthly for the difference and then at the expiration of their lease in a number of cases we have no doubt, in granting a reduction we have made the arrangements so that

they could apply future payments towards that unpaid balance." Murphy further testified that defendant was billed monthly for a \$100 balance, but defendant testified that when he received a bill for \$100 balance he called the attention of Murphy to that fact and the latter told him that it was "a slip up; don't worry about it; I will take care of it, that is in the auditing department, * * * to pay no attention to it." The judgment by confession was not entered until December 1, 1932. Prior thereto, plaintiff, apparently, took no steps to enforce the collection of the alleged unpaid balance, nor did it make any written demand upon defendant for the payment of the alleged balance due. It also appears that plaintiff desired defendant to make a new lease for a period commencing May 1, 1932, and that Murphy was disappointed when defendant did not do so.

Plaintiff contends that "an oral agreement to reduce the monthly rental under a written lease is a modification of the written instrument and is a violation of the rule of law prohibiting a sealed instrument to be varied by an oral agreement," and that "an agreement to reduce the monthly rental during the term of the tenancy is nudum pactum, without consideration and unenforceable." In Snow v. Griesheimer, 220 Ill. 106, 108-9, the court said:

"The agreement to reduce the rent was verbal, and it is contended that the court erred in admitting evidence that the agreement was entered into, for the reason that an executory contract under seal cannot be modified or changed by an agreement not under seal. That is the settled law. (Goldsborough v. Gable, 140 Ill. 269; Alachuler v. Schiff, 164 id. 298.) So long as the contract contained in the lease under seal remained executory, the plaintiff had a right to repudiate the parol agreement and claim the full amount of rent contracted for. The rule of law, however, is one that defeats the intention of the parties, and while it should be enforced in every case to which it applies, it is not to be extended to other cases to which it does not properly apply. If the parties have executed the contract as modified, so that nothing remains to be done by either party, it is no longer executory and the contract as executed will not be disturbed. The lease expired April 30, 1932, before suit was brought, and the evidence tended to show

that it had been fully performed by both sides. The fact that it had been so performed could be shown in defense of the suit. (White v. Walker, 31 Ill. 422; Worrell v. Forsyth, 141 id. 42; 9 Cyc. 597; McKenzie v. Harrison, 120 N. Y. 260.)" (See also Levy v. Greenberg, 251 Ill. App. 541.)

In the instant case, defendant paid \$250 per month from December 1, 1931, until the expiration of the lease, and the oral agreement was then fully executed.

Plaintiff has had a fair trial and the judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

time to have been fully explained by each other. The fact that
it had been so previously stated in the case of the unit.
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In the present case, the unit was not in the case of the unit.
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There was only one unit.

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Municipal council of the unit was not in the case of the unit.

Unit 111.

Unit 111, and Unit 112, and Unit 113.

36709

RUDOLF FISCHER,
Complainant,

vs.

EDWIN N. EDLUND et al.,
Defendants.

RENA A. EVENSEN and ELLA
E. EHRATH (Petitioners),
Appellants.

WILLIAM H. MELLIN, as Trustee
(Respondent),
Appellee.

44 H
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

273 I.A. 617²

MR. JUSTICE SCARLAN DELIVERED THE OPINION OF THE COURT.

On October 19, 1932, Rudolf Fischer, a bondholder, filed his bill to foreclose a trust deed securing a bond issue in the sum of \$90,000. This is an appeal by Rena A. Evensen and Ella E. Ehrath, owners of the equity of redemption, from an order directing the receiver to turn over certain funds in his hands, as shown by his final report and account, to William H. Mellin, as trustee, appellee.

On November 3, 1932, upon motion of complainant, the chancellor appointed a receiver to take charge of the premises and collect the rents, issues and profits, the order providing that "said appointment of said receiver shall become effective upon the complainant filing his bond in the sum of \$1,000 and upon said receiver filing his bond herein in the sum of \$10,000, and upon the approval of the said bonds by the court within five days from the date of the entry of this order." Neither bond was ever filed or approved by the court. On the same date appellee, as trustee, filed in the Circuit court of Cook county, his bill to foreclose the trust deed involved in the instant cause and at the same time moved for the appointment of a receiver to take charge of the premises, but his

RECEIVED
(Solely)

10

EDWIN A. BROWN OF CO.
Trustee

EDWIN A. BROWN AND WIFE
A. BROWN (Trustee)
Specialists

WILLIAM A. BROWN, as Trustee
(Respondent)
Specialist

EDWIN A. BROWN OF CO.

OF NEW YORK

273 I.A. 617

RE. WILLIAM A. BROWN, TRUSTEE OF THE TRUST

On October 19, 1935, William A. Brown, a respondent, filed his bill to foreclose a first deed securing a loan made in the sum of \$50,000. This is an appeal by William A. Brown and his wife, Edith, against the order of redemption, from an order appointing the receiver to turn over certain funds in his hands, as shown by his final report and account, to William A. Brown, as trustee, Special.

On November 1, 1935, upon motion of respondent, the Chancellor appointed a receiver in this matter of the premises and collect the rents, issues and profits, the order providing that "said appointment of said receiver shall become effective upon the completion and filing of his bond in the sum of \$1,000 and upon said receiver filing his bond herein in the sum of \$10,000, and upon the approval of the said bond by the court within five days from the date of the entry of this order." Whether bond was ever filed or approved by the court, or not, was this appealed, as trustee, filed in the Circuit Court of Cook County, his bill to foreclose the trust deed involved in the instant cause and at the same time moved for the appointment of a receiver to take charge of the premises, but his

counsel, ascertaining that a receiver had been appointed in the instant proceedings, withdrew the motion. On November 14, 1932, appellants filed their appearance in the instant cause. At the time of the entry of the order appealed from, the solicitor for complainant informed the court that pressure had been brought to bear upon his client to dismiss the bill and that the bonds were not given because complainant had decided to dismiss his bill. On November 30, 1932, complainant moved to dismiss his bill and an order was entered that the receiver file his final report and account within five days. On the same date appellee again moved the Circuit court for the appointment of a receiver for the premises in question, and a receiver was thereupon appointed in that proceeding. On December 7, 1932, the receiver in the instant cause presented his final report and account for approval, but no notice was served on the solicitor for appellants. The report showed collections of rents in the amount of \$952, disbursements in the amount of \$370.77, and a balance on hand of \$581.23, and the receiver asked for the allowance of receiver's fees and solicitor's fees in the total sum of \$150. On the same date, on motion of the solicitor for appellee, the receiver was ordered to turn over to appellee all moneys in his hands, although at that time no appearance had been entered for the appellee. On the same date, an order was entered dismissing the bill at complainant's costs. On December 10 appellants filed their verified petition in the instant proceedings reciting, inter alia, that no complainant's bond had ever been filed in the cause and that the receiver had never qualified; that the rents collected by the latter belonged to appellants, the owners of the equity of redemption, and praying that the chancellor enter an order directing the receiver to pay over to them the balance remaining in his hands. On the same date, upon notice to all parties of record, the court entered an order finding, inter alia, that no complainant's bond

stated, mentioning that a receiver had been appointed in the late
 about November, 1935, when the receiver was named. On November 14, 1935, the
 defendant filed with the receiver of the liquidation, at the time
 of the filing of the petition, the following for completion
 and information the same was prepared and was given to the receiver
 the clerk to transmit the bill and that the same was not given
 because completion had been made to him on the bill. On November
 14, 1935, completion having been given to him, the bill was not given
 except that the receiver filed the bill with the receiver and
 five days. On the same date completion again was given to the clerk
 for the completion of a receiver for the receiver in liquidation, and
 a receiver was appointed in liquidation. On December
 7, 1935, the receiver in the liquidation again presented his bill to
 the receiver and account for the same, but no action was taken on the
 bill. The receiver in the liquidation. The receiver in liquidation is named
 in the account of 1935, 1936, 1937, 1938, 1939, 1940, 1941, and
 a balance of \$100.00, and the receiver again for the liquidation
 of the receiver's bill and the receiver's bill in the liquidation of
 1935. On the same date, on the bill of the receiver for liquidation,
 the receiver was asked to file with the receiver all money in his
 hands, although at that time no completion had been received for the
 appeal. On the same date, on the bill of the receiver in liquidation the
 bill of completion was made. On November 14, 1935, the receiver in liquidation filed
 their bill with the receiver in the liquidation of the receiver, in the
 bill, that the receiver's bill was not given to the receiver in the liquidation
 and that the receiver had never received; and the receiver in liquidation
 by the receiver in liquidation, the receiver in liquidation of the receiver of
 completion, and the receiver in liquidation of the receiver in liquidation
 the receiver in liquidation of the receiver in liquidation in the receiver.
 On the same date, upon the bill of the receiver in liquidation, the receiver
 entered an order stating, after the bill, that no completion had been

was ever filed, that the receiver had never qualified, and that all the rents collected by him were the property of appellants, and the receiver was ordered to turn over to appellants \$431.23 within five days, "being the balance on hand as shown by his final account and report." On December 13, 1932, appellants moved the court to vacate the order of December 7, 1932, directing the receiver to pay to appellee the balance of funds in his hands, and on the same date the appearance of appellee was entered in the cause for the first time. On December 16, 1932, the motion of appellants came on for hearing and the chancellor entered an order which vacated the order of December 7, 1932, directing the receiver to pay to the appellee the balance of funds in his hands, also vacated the order entered upon the same day dismissing the bill, also vacated the order approving the receiver's final report and account, and also vacated the order entered December 10, 1932, directing the receiver to turn over to appellants the balance in his hands. The order provided that appellee be given leave to file his appearance and answer to the petition of appellants filed on December 10, 1932, and that the cause be set down for hearing on said petition and answer. On January 5, 1933, the petition came on for hearing and the chancellor entered the order from which appellants have appealed. It was conceded that the receiver never qualified, although it appears that he collected certain rents from the tenants of the building, and the sole question upon the hearing was: Who was entitled to the rents collected by the receiver, - appellants, as owners of the equity of redemption, or appellee, as trustee under the trust deed? Both parties agree, upon this appeal, that the answer to this question turns upon the answer to the following question: "Was the trustee in possession of the premises as provided in said trust deed on the 3rd day of November, 1932, the date the receiver in this case was appointed?" Both parties further admit that if the trustee, appellee,

was in possession at that time, then the rents collected by the receiver belong to appellee; that if the trustee was not in possession at that time, then the rents must go to appellants, the owners of the equity of redemption. The answer of appellee (not under oath) alleges that he took possession of the premises on September 30, 1932, by serving a notice on all tenants which set up the defaults and demanded that all further payments of rent be paid to him as trustee. Appellants denied that the trustee, appellee, had taken possession of the premises prior to the appointment of the receiver, and further denied that appellee collected rents from the tenants of the building.

In the final order, directing the receiver to pay over the funds in his hands to appellee, the chancellor found that on November 3, 1932, the date of the appointment of the receiver, the trustee, appellee, "was in possession of the premises and collecting the rents and issues and profits accruing from said building." Upon a reading of the certificate of evidence we find that the chancellor, upon the hearing, heard no evidence of any kind. All that the certificate shows is a colloquy between the chancellor and the solicitors for the parties. Instead of hearing evidence to determine the vital issue of fact in the case, the chancellor concurred, apparently, in the argument advanced by solicitors for appellee that payment to the trustee would lessen the amount of the default and would thereby aid appellants, owners of the equity of redemption, "to eventually redeem." This argument does not set up a good defense to the petition of appellants. The latter frankly conceded that the trust deed authorized the trustee to take possession of the premises upon default, but they strenuously insisted that this right had not been exercised at the time the receiver was appointed and that therefore under the law (Rohrer v. Deatherage, 336 Ill. 450) they were entitled to the rents. It is clear that the

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chancellor could not make the finding as to possession from the pleadings.

In this court appellee argues that "no injustice has been done to anyone concerned by directing the receiver to pay the money to the trustee. A default has occurred under this trust deed and payment to the trustee will tend to lessen the default and will aid the owners of the equity to eventually redeem. In the event there is a deficiency after sale it will tend to decrease the deficiency against the signers of the paper. However, in any event when a decree of foreclosure is entered in the Circuit court, wherein this foreclosure is now pending, the owners of the equity will be given a credit for all payments to the trustee." We have heretofore answered this argument.

The order in this case is reversed and the cause is remanded with directions to the chancellor to hear the petition of appellants de novo; to take testimony for the purpose of determining the vital question of fact in the case as to whether or not the appellee was in the possession of the premises at the date of the appointment of the receiver; that if the chancellor finds that appellee was in possession he shall order the moneys in the hands of the receiver to be paid to appellee, and if he shall find that the appellee was not in possession of the premises at the said time he shall order the moneys paid to appellants.

REVERSED AND REMANDED WITH DIRECTIONS.

Sullivan, P. J., and Gridley, J., concur.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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the author is not responsible for any errors or omissions.

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1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

2. The second part of the paper is devoted to the study of the asymptotic behavior of the solutions of the system (1) as $\epsilon \rightarrow 0$. It is shown that the solutions of the system (1) converge to the solutions of the system (2) as $\epsilon \rightarrow 0$.

add 1000 to the count on 11 Nov 1963 (same as 11 Nov 1962) 151

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36757

MORRIS SALMON,
Defendant in Error,

v.

MRS. E. R. SOLOMON,
Plaintiff in Error.

ERROR TO SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 617³

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Writ of error sued out to review a judgment against defendant in the sum of \$2,390. The action was in assumpsit and the cause was tried by the court.

The declaration consisted of the common counts. The common law record shows that plaintiff filed, upon order, a bill of particulars. Defendant objected to the introduction in evidence of a check drawn on the First State Bank of Chicago Heights, Illinois, on the ground that the bill of particulars stated that the check was drawn upon a different bank. The court admitted the check and gave plaintiff leave to amend the bill of particulars, but the common law record does not show that such amendment was filed, and defendant argues that "because of the variance between the check offered in evidence, and the check sued on, described in the bill of particulars, the exhibit ought not have been received in evidence." The bill of particulars was not preserved in the bill of exceptions and therefore it cannot be considered by us. (See The Star Brewery v. Farnsworth, 172 Ill. 247, 250, and cases cited therein; Pope County State Bank v. U. G. I. Contracting Co., 265 Ill. App. 420; and Harbaugh v. City of Sullivan, 206 Ill. App. 496, 499, and cases cited therein.) Moreover, the alleged variance is not covered by the formal

MEMORANDUM FOR THE ATTORNEY GENERAL
 DEPARTMENT OF JUSTICE

W.

U. S. DEPARTMENT OF JUSTICE
 WASHINGTON, D. C.

DEPARTMENT OF JUSTICE
 WASHINGTON, D. C.

U. S. DEPARTMENT OF JUSTICE

THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D. C.

With respect to the review of a judgment against

defendant in the case of *U.S. v. [Name]*, the review was in accordance

with the rules and policy of the court.

The defendant's counsel at the common law trial.

Common law record shows that defendant filed upon entry a bill

of particulars. Defendant objected to the introduction in

evidence of a check drawn on the First State Bank of Chicago

dated August 11, 1937, on the ground that the bill of particulars

stated that the check was drawn upon a different bank. The

court rejected the objection and permitted the check to be introduced.

Bill of particulars, but the common law record does not show that

such objection was filed, and defendant argues that "because of

the variance between the check offered in evidence, and the check

and on, described in the bill of particulars, the court's ruling

not have been justified in evidence." The bill of particulars was

not presented in the bill of particulars and therefore it cannot

be introduced by me. (See *U.S. v. [Name]*, 1937, 1938, 1939)

U.S. v. [Name], 1937, 1938, 1939, and *U.S. v. [Name]*, 1937, 1938, 1939

U.S. v. [Name], 1937, 1938, 1939, and *U.S. v. [Name]*, 1937, 1938, 1939

U.S. v. [Name], 1937, 1938, 1939, and *U.S. v. [Name]*, 1937, 1938, 1939

assignments of error and therefore cannot be reviewed. (See Brown v. Higgins & Iyer Const. Co., 259 Ill. App. 34, and cases cited therein.) Indeed, it would seem, from a colloquy between the court and defendant's counsel, that the objection was not insisted upon.

Defendant contends that plaintiff has not proven his case by a preponderance of the evidence.

The theory of fact of plaintiff was that he delivered a check for \$2,000 to defendant, in payment of the purchase price of a parcel of real estate, and that defendant never executed any conveyance of the real estate and never returned the \$2,000 to plaintiff. It is conceded that defendant never executed any conveyance of the real estate to plaintiff. Defendant argues that the evidence shows that "the \$2,000 check was not delivered to her, and was not endorsed by her, and she did not receive any part of the proceeds thereof. * * * The check for \$2,000 was endorsed with the name of the defendant, by defendant's husband, and was cashed at a bank in the presence of the plaintiff; and the entire sum of \$2,000 was thereupon turned over to the plaintiff."

The case was tried by the court and the bill of exceptions shows that he paid close attention to the evidence and took an active part in the examination of the witnesses. As plaintiff strenuously complains that the abstract filed was insufficient and unfair, we have seen fit to read the entire bill of exceptions, and after a very careful examination of the evidence and exhibits we are satisfied that the finding of the trial court was fully justified and should be sustained.

Plaintiff testified that he was well acquainted with the Solomons; that he had an oral agreement with defendant and her husband, Dr. Alfred P. Solomon, to purchase the premises known as

assignment of these two accounts seems to be correct. (10)
From a study of the account of the 11th, 12th, and 13th
pages (11-13), indeed, it would seem that a fairly good
the state and defendant's account, that the objection was not
included herein.

Defendant contends that Plaintiff was not present at
case by a representation of the evidence.

The timing of the Plaintiff's case was delivered
a check for \$1,000 in settlement, in payment of the purchase price
of a parcel of real estate, and that Plaintiff never received any
conveyance of the real estate and never received the \$1,000 in

Plaintiff. It is further stated that Plaintiff never executed any con-
veyance of the real estate to Plaintiff. Defendant states that
the evidence shows that the \$1,000 check was not delivered to

him, and was not cashed by him, and that he did not receive any part
of the proceeds thereof. The check was \$1,000 and was marked

with the name of the defendant, by defendant's signature, and was
dated at a bank in the name of the Plaintiff and the entire
sum of \$1,000 was delivered from him to the Plaintiff.

The sum was given to the court and the bill of exchange
shows that it was paid from Plaintiff to the evidence and took
an active part in the transaction of the Plaintiff. The Plaintiff

personally cashed the check and the amount was immediately
and which, we have seen, is to give the entire bill of exchange,
and after a very careful examination of the evidence and exhibits

we are satisfied that the timing of the Plaintiff's case was fairly
correct and should be sustained.

Plaintiff submitted that he was well represented with the
evidence; that he was in good agreement with defendant and that
defendant, who, indeed, is believed to be the person known as

207 and 209 East 16th street, Chicago Heights, Cook County, Illinois, for \$2,000 cash, he to assume a mortgage on the premises in the sum of \$6,300; that after the agreement was made he procured a cashier's check on the First State Bank of Chicago Heights, made out to Dr. Solomon, and by arrangement met Dr. Solomon at the office of the attorney for the Solomons, David M. Caplow; that Caplow there told him the check could not be accepted, as the property belonged to Mrs. Solomon and that he should make out a new check payable to her; that he then took the check and redeposited it in his bank; that some time later he went to the home of the Solomons and after some talk with them made out a new check for \$2,000, payable to the order of Mrs. Solomon, and presented it to her. He was further questioned as follows: "Q. Did you give her this check yourself? A. Yes sir. Q. To her personally? A. Yes, to both of them. Q. You mean to Dr. and Mrs. Solomon? A. Yes. Q. Where did you turn it over to them? A. At his own house. Q. Had this check been made out before you came in the house or was it made out in the house? A. With Dr. Solomon's pen and ink, in his own house. Q. You were to get -- in consideration of this check you were to get the east side property in Chicago Heights on 16th street? A. Yes. Q. What kind of property is it? A. A lot and store. Q. And after you gave this check, after you turned this check over to Dr. and Mrs. Solomon, did you ever see this check after that until it was returned to you by the bank? A. That's all. Q. You didn't see the check after giving it to Mrs. and Dr. Solomon? A. No. Q. You didn't stay in their company after that, did you? A. No. Q. How long did you remain in their house? A. Just long enough to write the check. Q. You didn't go to the bank with them? A. No. Q. You didn't go to the Stony Island Bank? A. No, sir. Q. Did you see Dr. Solomon sign his name to the back of that check? A. No sir. Q. Did you see him sign his name to that check? A. No."

Defendant did not testify. Her husband testified that plaintiff's statement in reference to the first check was false in toto, and he emphatically stated that he never saw or knew anything about such a check. He testified further, in substance, that Sam Rosen, defendant's father, owed plaintiff's wife some money; that the property in question had been Rosen's but at the time was held in trust for defendant; that plaintiff and Rosen came to his office in his home and plaintiff said: "We are going to pass a check now. I am going to give you a check for \$2,000, the purpose of which is to show consideration for the transfer of the property," and I said, 'All right, I'll do that.' That seemed to be satisfactory to Mr. Rosen, who was familiar with the deal.

Q. What did Rosen say? A. Mr. Rosen asked me to do this.

The Court: Q. When he said, 'I am giving you this for the purpose of showing a consideration,' did Rosen say that was all right?

A. Yes." The witness further stated that plaintiff came to his house with the check made out, but he corrected this statement and said that he, plaintiff, and Rosen went to the Stony Island State Savings Bank, and in front of the bank, in the witness's automobile, plaintiff wrote out a check for \$2,000 to Mrs. E. E. Solomon; that Mrs. Solomon was not there because he, the witness, did not wish to have her mixed up in the matter; that he indorsed her name upon the back of the check, "simulating her signature," and then indorsed his own name beneath his wife's name; that he was known at the bank and had an account there and that he took the check to the cashier of the bank and received from him \$2,000 in cash; that he put the money in his pocket and afterward returned to the car and there gave plaintiff the \$2,000. This check bears upon its face the following words, "For Real Estate trans." Dr. Solomon testified that he was certain that at the time he cashed the check these words were not upon it. A close examination of the photostatic copy

of the check shows that the perforated cancellation mark made by the bank, to indicate payment of the check, covers part of the words in question, and an inspection of these words with a microscope fails to indicate the condition that would follow if these words had been written over the perforations. Dr. Solomon testified, at first, that the check was not given "for any real estate transfer" to be made. He was then interrogated by the court:

"Q. You intended to give him a deed, and as it happened, he gave you the \$2,000 and he was to get the deed, and then you thought you had better call up Mr. Caplow and Mr. Caplow said you shouldn't do it because things were getting a little complicated? A. That's right." Finally the witness admitted that it was understood in the discussion that took place in his house just before they started for the bank that the deed would be given to plaintiff; that a deed was to be given plaintiff but that he (Solomon) commenced to think, while he was at the bank, that the whole transaction was not legal; that he "felt wrong about the whole thing," so he called up his attorney, after he had cashed the check and turned over the money to plaintiff, and told him what he had done, and the attorney "roundly condemned" him and said that "the thing shouldn't have been done," that Rosen's business was getting bad and that it was not advisable to make a transfer. Defendant's attorney, Caplow, testified that the testimony of plaintiff to the effect that he brought a check to the office of the witness, made payable to Dr. Solomon, for \$2,000, was false in toto. The trial court, realizing the importance of this issue of fact, adjourned the hearing for a few days in order that plaintiff might have an opportunity to produce the first check. When the hearing was resumed plaintiff produced and introduced it. It was a certified check for \$2,000, dated September 30, 1929, signed by plaintiff and made payable to Dr. E. R. Solomon (defendant's name is Esther Rosamond Solomon). On the back of this check,

which had been redeposited by plaintiff, appear the following indorsements: "E. R. Solomon E. Salman." The doctor, as we have already stated, testified that he indorsed the name "Mrs. E. R. Solomon" on the check that was cashed. When plaintiff produced the check dated September 30, 1929, a photostatic copy of which appears in the record, Dr. Solomon took the stand and testified, positively, that he did not write the ^{indorsement} ~~the~~ "E. R. Solomon" upon that check. We have very carefully examined the indorsements on both checks and we are satisfied that the trial court was fully justified in holding that if the doctor wrote the name Mrs. E. R. Solomon upon the check that was cashed, then he also wrote the name E. R. Solomon upon the first check. The record shows that the trial court regarded the first check as a most important piece of evidence in determining the truth of the case, and we entirely agree with him in that regard. As defendant strenuously argues, Caplow testified that plaintiff had been at his office many times since the check was cashed and on each occasion had told him that he had gotten his money back; "every time, without fail," he so told him; that even after plaintiff had started the instant suit he told the witness that he had gotten his money back, "but Dr. Solomon wouldn't be able to prove he got his money back, so he was going through with the suit. Q. Every time he appeared at your office you asked him if he got paid the \$2,000 back, is that correct? A. Why, sure." The trial court indicated surprise at this testimony and it is evident from his finding that he did not believe it. This attorney further testified that he handled the matter of "putting Rosen's property in trust for defendant," and that at the time the check was cashed he told the doctor, over the telephone, that he did not know how long Rosen would be able to hold out, that if things did not improve there was only one way out for Rosen, - bankruptcy or an assignment for the creditors, and that he (Caplow) would not allow a transfer of the

which had been received by plaintiff, under the following in-
 formation: "J. R. Solomon & Co., Inc., New York, N. Y., as we have
 already stated, testified that he returned the name 'J. R. S.
 Solomon' on the check book was correct. When plaintiff produced the
 check dated September 21, 1937, a photostatic copy of which appears
 in the record, Dr. Solomon took the check and testified, positively,
 that he did not write it. 'J. R. Solomon' upon said check. We have
 very carefully examined the documents on both checks and we are
 satisfied that the trial court was fully justified in finding that
 if the doctor wrote the check, then he also wrote the name 'J. R. Solomon' upon the first
 check. The record shows that the trial court regarded the first
 check as a most important piece of evidence in determining the
 truth of the case, and he entirely agrees with him in that regard.
 As defendant strenuously denies, plaintiff testified that plaintiff
 had been at his office many times since the check was cashed and on
 each occasion had told him that he had gotten his money back; 'every
 time, almost daily,' he so told him; that even after plaintiff had
 started the lawsuit with him, the witness that he had gotten his
 money back, 'but Dr. Solomon wouldn't be able to prove he got his
 money back, so he was paid through with the suit. Every time
 he appeared at your office you asked him if he got paid the \$2,000
 back, is that correct? 'Oh, yes.' The trial court indicated
 surprise at this testimony and it is evident from his finding that
 he did not believe it. His testimony further testified that he
 handled the matter of 'getting money's property in trust for de-
 fendant,' and that at the time the check was cashed he told the
 doctor, over the telephone, that he did not know how long money
 would be able to hold out. That if things did not improve there was
 only one way out for money, - bankruptcy or an assignment for the
 benefit of creditors, and that he (Solomon) would not allow a transfer of the

Indorsement

property to plaintiff because that would "further complicate matters." The witness further testified that shortly after the check was cashed he acted as attorney for Rosen in bankruptcy proceedings brought against the latter, and he admitted that he did not schedule the property in question in the bankruptcy proceedings. Asked to explain why, in view of that fact, he had objected to defendant's giving plaintiff a deed to the property, he stated he was afraid that if the deed were given someone might raise a question of preference in case bankruptcy proceedings were thereafter started. Rosen, the father of defendant, corroborated the testimony of Dr. Solomon that the latter gave back the \$2,000 to plaintiff. His testimony, in some respects, does not sustain the testimony of Dr. Solomon. Rosen testified, when closely interrogated by the court, that the understanding of the parties was that plaintiff was to give \$2,000 to defendant and that the latter was to give to plaintiff a deed to the property on 16th street, if Dr. Solomon's lawyer "decided it is all right." He further testified that after Dr. Solomon had cashed the check, but before he turned the money back to plaintiff, the doctor had a telephone conversation with Caplow and then said to plaintiff: "I am sorry. We can't go through with the deal, because Mr. Caplow objected to it," and that the doctor then gave plaintiff back the money, "it was fifty-dollar bills and hundred-dollar bills;" that Dr. Solomon said: "'Let's go out to the automobile and we'll see.' We went to the automobile; we all got in and he said, 'Mr. Salzman, I am sorry we can't go through with the transaction, whatever it is. I have to give you the money back.' He just took out the money and gave it to him." Plaintiff testified that the testimony of Dr. Solomon and Rosen as to the cashing of the check at the bank was false in toto; that he never received back any money from

property to plaintiff because some money "I think" was given to him. The witness further testified that shortly after the check was cashed he asked the attorney for advice in bankruptcy proceedings brought against the interest, and he admitted that he did not consider the property in question in the bankruptcy proceedings. Asked to explain why, in view of the fact that he was subject to defendant's giving plaintiff a deed to the property, he stated he was afraid that if the deed were given someone might raise a question of preference in some bankruptcy proceedings were thereafter started. Again, the father of defendant, corroborated the testimony of Dr. Solomon that the latter gave him the \$7,000 to plaintiff. His testimony, in some respects, does not sustain the testimony of Dr. Solomon. When recalled, when closely interrogated by the court, that the understanding of the parties was that plaintiff was to give \$2,000 to defendant and that the latter was to give to plaintiff a deed to the property on 15th street. Dr. Solomon's lawyer testified it is all right. He further testified that after Mr. Solomon had cashed the check, the latter had turned the money back to plaintiff. The doctor had a telephone conversation with Caplow and then said to plaintiff: "I am sorry. I can't go through with the deal, because Dr. Caplow refused to do it," and that the doctor then gave plaintiff back the money. "It was fifty dollars plus the interest on the fifty," Dr. Solomon said: "Let's go out to the restaurant and eat all day." He went to the restaurant; he did not eat there, Dr. Solomon, I am sorry we didn't go through with the transaction, however it is all right. Have to give you the money back. He just took out the money and gave it to him. Plaintiff testified that the testimony of Dr. Solomon and himself as to the making of the check at the bank was false in fact. That the doctor received back any money from

Dr. Solomon. He further testified that the testimony that he had given the check for the purpose of having it appear "in a subsequent bankruptcy proceeding that he had paid value for the property" was "a lie;" that his agreement with defendant had nothing to do with the Rosen bankruptcy; that he wanted the property and considered it "a fair piece of property;" that the Solomons never told him that Rosen was going into bankruptcy, nor did they ever mention that the defendant held title through her father. Plaintiff further testified that he had no lawyer in the transaction and that Caplow promised him that he would be furnished with an abstract and a deed to the property "in a few days." As indicating the attitude of mind of the plaintiff, Dr. Solomon testified that plaintiff, after the transaction in question, in various public places, called him a crook and a swindler, and threatened to go to the synagogue where the doctor attended, and to the hospital to which he was attached, and denounce him as a crook.

Defendant, in a final effort to avoid the judgment, strenuously argues that the evidence does not show "that she had received the check in the sum of \$2,000, or that she derived any benefits thereof." The testimony of plaintiff shows that he made out the check to the defendant and handed it to her, or, as he also states, "to her and her husband," and if she permitted her husband to indorse her name to the check and to obtain the money on it, she is in no position to contend that she did not receive the money thus acquired by her husband. Her failure to testify is most significant.

The judgment of the Superior court of Cook county is a just one and it should be and it is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

36767

46 A

JACOB WARNER,
Appellee,

v.

HYMAN SOBOROFF,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 617⁴

MR. JUSTICE SCAMLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in a fourth class action in the Municipal court of Chicago. The case was tried by the court and there was a finding in favor of plaintiff and his damages were assessed at the sum of \$300. Defendant has appealed from a judgment entered upon the finding.

In plaintiff's statement of claim he alleges "that on, to-wit: the 1st day of July, 1931, he deposited the sum of \$300 with the defendant herein for the purpose of paying certain gas and electric bills; * * * that the defendant has failed to pay said bills or return the above sum to the plaintiff. To the damage of the plaintiff in the sum of \$300, wherefore plaintiff brings this suit." Defendant, in his affidavit of merits, states that he "was the escrowee under a contract between Israel Lewis and Jacob Warner, wherein Hyman Soboroff, as escrowee, was to pay \$750 upon certain conditions relative to the payment of light, gas and telephone bills, among others, and contingent upon the turning over possession by Jacob Warner to Israel Lewis;" admits the receipt of the \$750 in escrow, and alleges that upon the representation of plaintiff that all adjustments were made between the latter and Lewis pursuant to the terms of said escrow agreement, defendant paid to plaintiff the sum of \$450 of the escrowed

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JACOB VARNER, Appellant.
v.
HYMAN FORD, Appellee.

APPEAL FROM DISTRICT COURT OF THE DISTRICT OF COLUMBIA

FILED FOR RECORD

2231A.617

MR. JUSTICE EDWARD T. AHERN delivered the opinion of the court.

Plaintiff sued defendant in a tortious action in the Municipal Court of the District of Columbia. The case was tried by the court and there was a finding in favor of plaintiff and his damages were assessed at the sum of \$250. Defendant has appealed from a judgment entered upon the finding.

In plaintiff's statement of claim he alleges "that on, to-wit: the 1st day of July, 1931, he deposited the sum of \$250 with the defendant bank for the purpose of paying certain gas and electric bills; that the defendant has failed to pay said bills or return the above sum to the plaintiff. To the damage of the plaintiff in the sum of \$250, wherefore plaintiff brings this suit." In his affidavit of merits, stating that he "was the payor under a contract between Israel Lewis and Jacob Varnar, wherein Varnar, as payor, was to pay \$750 upon certain conditions relative to the payment of light, gas and telephone bills, water, sewer, and contingent upon the turning over possession by Jacob Varnar to Israel Lewis; the receipt of the \$750 in money, and alleges that upon the representation of plaintiff and his witnesses were made between the latter and Lewis pursuant to the terms of said contract three-

amount, withholding \$300 to cover certain unpaid bills; that on July 1, 1931, he received notice that plaintiff had collected rentals in advance in the sum of \$773.50, and that because of the misrepresentation made at the time the \$450 was paid to plaintiff no money was due to plaintiff from defendant as escrowee under the terms of said contract.

The following is the only contention raised by defendant in his brief: "Plaintiff in a civil cause must make out his case by a preponderance of the evidence," and plaintiff failed in that regard. After a careful consideration of the entire evidence in this case we have reached the conclusion that there is no merit in the contention, which is based upon the argument that "an affirmative statement by one witness met by a flat and categorical denial by another of equal credibility does not meet the requirement of the law that the plaintiff must make out his or her case by a preponderance of the evidence." It is sufficient to say, in answer to this argument, that the evidence of plaintiff was corroborated by the following written instrument drafted by defendant, an attorney at law:

"Hyman Soboroff
Attorney At Law
10 North Clark St.

"Chicago
July 1, 1931

"Received of Hyman Soboroff, Escrowee under the terms of an agreement bearing date June 30, 1931, between Israel Lewis and Jacob Warner, the sum of \$450, the said Hyman Soboroff retaining from the amount of \$750 the sum of \$300 toward the payment of the electric light bills and gas bills on premises 50-52 North Long Avenue, Chicago, Illinois, and the said Hyman Soboroff is hereby authorized and directed out of said sum of \$300 to pay such electric light bill and gas bill, and any deficit remaining due, the undersigned agrees to pay to the said Hyman Soboroff upon demand. The said Hyman Soboroff is hereby authorized to pay the electric light bills to June 3, 1931, in the sum of \$126.98 and the gas bills submitted in the sum of \$33.81, and to deduct the same from the sum of \$300 by him retained.

"(Signed) Jacob Warner
by Ben H. Kessler."

Defendant admits that he drafted this instrument, and while he calls it a "receipt," and is unwilling to concede that it is in the nature of a contract, nevertheless, it is a contract and he is bound by its terms, even though he did not sign it. As to the alleged defense, it is sufficient to say that the trial court was fully justified in finding, from the evidence, that the escrow agreement of June 30, 1931, had been consummated and that defendant, under the instrument of July 1, 1931, was obligated to pay the gas and electric light bills with the \$300 retained by him or return the money to plaintiff on demand. He concedes that he did not pay the electric light and gas bills.

There is no merit in this appeal, and the judgment of the Municipal court of Chicago will be affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

But having found that the contract was not made, and that no
offer is a "contract," and is not binding, it is not binding and he
the nature of a contract, nevertheless, it is a contract and he
is bound by the terms, even though he did not sign it. In the
obliged before, it is an obligation to pay that the trial court was
fully satisfied in finding, from the evidence, that the answer
agreement of June 20, 1931, had been communicated and that certain
and, under the provisions of this act, was obligated to pay
the sum and interest thereon. The sum was retained by him or
toward the money as indicated on account. He answered that he
did not pay the interest thereon and the bills.
There is no mark in this record, and the judgment of
the municipal court at Chicago will be affirmed.

WILLIAM

WILLIAM, et al., vs. Chicago, et al., 1931.

47 H
36807

PARK LANE HOTEL COMPANY,
a Corporation,
Appellant,

v.

FRANK WEINBERG,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 617^s

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff sued defendant in the Municipal court of Chicago in an action of the first class. The case was tried by the court and there was a finding and judgment in favor of defendant. Plaintiff has appealed.

The statement of claim alleges, in substance, that plaintiff is the owner of the premises known as the Park Lane Hotel, located at 2842 Sheridan Road, Chicago, and that on February 7, 1929, plaintiff and defendant entered into a written lease "for apartmentz Numbers 502-503, to commence July 1st, 1929 and expiring June 30th, 1931, which lease provided for a monthly rental of \$300 for the term of said lease, a copy of which lease is hereto attached, marked 'Exhibit A' and made part of this, plaintiff's statement of claim; * * * that defendant remained in possession of said premises after June 30th, 1931, the stated termination date of the aforesaid lease, and continued to occupy said premises, and because of said holding over of said defendant, the plaintiff herein elected to treat the defendant as a tenant for another year under the terms of the aforesaid lease; * * * that during the period commencing July

5288

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

4 5

1911

1931-1932

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ST. ALGYS

1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

Students. Initially two applicants.

[illegible]

1st, 1931, and expiring June 30th, 1932, the sum of \$3600, consisting of twelve months rent at the rate of \$300 per month became due and payable from defendant to plaintiff, and that during said period the defendant has paid the plaintiff the sum of \$550, leaving a balance due at this time from defendant to plaintiff the sum of \$3050."

Defendant's affidavit of merits admits the execution of the lease and avers that defendant terminated it by mailing to plaintiff a letter, dated March 4, 1931, which states that defendant "did not intend to renew my present lease unless a substantial reduction is made," and to "accept this letter as formal notice of my intention to move when my present lease expires.;" that prior to the termination of the original term, "defendant and his wife, both, together and separately, discussed with one Frederick C. Skillman, plaintiff's manager in the operation of the said Park Lane Hotel, the terms upon which defendant would enter into a new lease of the premises;" that after June 30, 1931, defendant and his wife discussed with said manager the terms upon which they would continue to use the premises; "that at the time of such discussion, defendant had continued with the knowledge and consent of plaintiff to use and occupy the said apartment;" "that, therefore, tenant did not hold over after the termination of the said Indenture of Lease; that it subsequently was agreed with the said plaintiff, through its manager, Frederick C. Skillman, that defendant might continue to use and occupy the said premises as a month-to-month tenant; that, therefore, the defendant did not hold over after the termination of the said Indenture of Lease, but did occupy the said demised premises as the tenant of plaintiff on a month-to-month tenancy; that subsequently, by notice, dated and served on July 30th, 1931, defendant terminated said month-to-month tenancy as of the last day of

August, 1931; that prior to the 1st day of September, 1931, defendant vacated said premises * * * after having paid all sums due plaintiff for the occupancy thereof under the month-to-month tenancy."

It is conceded that defendant remained in the premises after the expiration of the term of the written lease, and it is undoubtedly the law, as plaintiff contends, that "where a tenant holds over, after the expiration of his term, the law will imply an agreement to hold for another year, upon the terms of the prior lease, at the election of the landlord, in the absence of a contrary agreement." In Weber v. Powers, 213 Ill. 370, 382, it is said:

"Where a tenant for a year or years holds over after the expiration of his lease, without having made any new arrangement with his landlord under which such holding over takes place, the landlord, at his election, may treat the tenant as a trespasser, or as a tenant for another year, upon the same terms as in the original lease, and this though the tenant has no intention of holding over for a year, or of paying the same rent. The law fixes the tenant's liability for holding over, independent of his intention. The legal presumption of a renewal from the holding over cannot be rebutted by proof of a contrary intention on the part of the tenant alone." (Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151). The right of election as to whether the tenant, remaining in possession after the expiration of the lease, is holding over upon the same terms as in the original lease is a right, which belongs to the landlord, and not to the tenant. It is the landlord alone, whose intention on the subject is to be ascertained, as it is he alone, who may elect to treat the tenant as holding over under the terms of the old lease. (Keogan v. Kinnare, 123 Ill. 280.)" (See also Weiss v. Danilowik, 282 Ill. App. 551.)

If it were necessary other cases to the same effect might be cited.

That plaintiff made out a prima facie case was conceded by the trial court and plaintiff contends that in that state of the record the burden of proving, by a preponderance of the evidence, that another agreement than that of holding over under the terms of the lease, was upon defendant, and that he failed to sustain this burden. After a very careful examination of the facts and circumstances in evidence, we have reached the conclusion that this con-

tention is a meritorious one. That defendant was not consistent in the matter of his defense, as plaintiff argues, must be conceded. To illustrate: The affidavit of merits states that it was later agreed with plaintiff's manager that defendant might remain as a month to month tenant, that, therefore, defendant did not hold over after the termination of said lease, and that defendant terminated said month to month tenancy and vacated the premises. In his testimony defendant stated that the manager told him that if he did not succeed in getting the owners to agree to a reduction of defendant's rent the latter was at liberty to move "at any time that I wanted to." In this court defendant states his theory of defense as follows: "Plaintiff is precluded from treating defendant as a tenant from year to year after the expiration of the term of the written lease for the following reasons: (a) Immediately prior to the expiration of the written lease, plaintiff and defendant discussed the terms upon which plaintiff might continue to occupy his apartment, and relying upon the express statement by the agent of appellant that such negotiations could be satisfactorily completed within a short time, defendant continued in possession of the premises after the expiration of the written lease. (b) Subsequent to the expiration of the written lease there were negotiations between defendant and plaintiff for a further written lease upon terms different from those of the written lease, and by virtue thereof and because defendant was billed monthly for rent defendant became a tenant of plaintiff from month to month." Plaintiff contends that judgment should be entered here in the sum of \$3,050, for rent from September 1, 1931, to July 1, 1932, but we are of the opinion, after giving this contention serious consideration, that justice demands that there should be a retrial of this cause.

[illegible]

The judgment of the Municipal court of Chicago is reversed and the cause is remanded for a new trial.

REVERSED AND REMANDED.

Sullivan, P. J., and Gridley, J., concur.

The payment of the interest on the loan is
reversed and the same is returned for a new trial.

REVEREND AND HONORABLE

WILLIAM J. B. AND OTHERS, PLAINTIFFS

37179

FRANK C. BATHJE, Receiver,
Appellee,

v.

EDWARD REIFF and BERTHA REIFF,
Appellants.

INTERLOCUTORY

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

273 I.A. 618¹

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Edward Reiff and Bertha Reiff, defendants, from an interlocutory order appointing a receiver of certain real estate upon a bill for the foreclosure of a first mortgage trust deed executed to secure the payment of a principal note in the sum of \$35,000 and certain interest notes.

The major contention of defendants is that "to justify the appointment of a receiver upon the original bill of complaint, the bill must be duly verified and self-sufficient, and must not be based on information and belief, but must contain all of the necessary allegations of fact that would justify the Court in appointing a receiver." The following is the verification of the bill:

"State of Illinois }
County of Cook } ss:

Frank C. Bathje, as Receiver of the assets of a trust estate created by a certain Trust Agreement executed by and between The Foreman Trust and Savings Bank, a corporation, and A. G. Becker & Co., a corporation, being first duly sworn upon oath, deposes and says that he is the complainant in the above entitled cause; that he has read the above and foregoing Bill of Complaint by him subscribed; knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief,

and as to such matters and things, he believes them to be true.

(Signed) Frank C. Rathje

Subscribed and sworn to
before me this 28th day of June, A. D. 1933.
Charlotte Burkhardt
Notary Public"

Defendants argue that "the purported verification states that the allegations contained in the bill are true of the affiant's own knowledge except as to the matters and things therein stated upon information and belief and as to such matters he believes them to be true;" and that "an examination of the bill fails to disclose what allegations are based upon information and belief." Defendants cite, in support of their contention that the verification in the instant case is bad, Grabowski v. MacIsakey, 237 Ill. App. 484, decided by the third division of this court. This division of the court is not in accord with the rule laid down in that case. (See Reliance Bank & Trust Co. v. Balsey, 263 Ill. App. 546; also the able opinion of Mr. Justice O'Connor in Petersen Co. v. Asphalt Sales Corp., 235 Ill. App. 592.)

Defendants contend that the case made out by the bill did not warrant the appointment of a receiver and they cite, in support of this contention, Frank v. Siegel, 263 Ill. App. 316. We concurred in the holding of the majority opinion in that case that even though the trust deed conveys the rents and profits as security and provides that a receiver of the premises may be appointed upon default in the payment of any of the indebtedness, a receiver should not be appointed solely upon the allegations of the bill to foreclose that there is such a default and a general allegation that the security is scant; and we also concurred in the further holding that the burden was upon the applicant for a receiver to present facts by

1. The first step in the process of identifying a problem is to define the problem clearly. This involves identifying the symptoms of the problem and determining the scope of the problem. Once the problem has been defined, the next step is to identify the causes of the problem. This involves identifying the factors that are contributing to the problem and determining the underlying causes of the problem. Once the causes of the problem have been identified, the next step is to develop a plan to address the problem. This involves identifying the actions that need to be taken to address the problem and determining the resources that will be needed to implement the plan. Once a plan has been developed, the next step is to implement the plan. This involves taking the actions that have been identified in the plan and putting them into practice. Finally, the last step in the process is to evaluate the results of the plan. This involves determining whether the plan has been successful in addressing the problem and identifying any areas that need further attention.

1890-1891

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the only fact in that case. (See Williams v. United States, 100 U.S. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 9

See also: [illegible] [illegible] [illegible] [illegible]

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verified bill, petition, or by evidence showing the necessity for such an appointment. We adhere to what we there said but we are of the opinion that the allegations of the instant bill were sufficient to support the order of appointment, especially in view of the attitude of defendants in the trial court. While they entered their appearance in the cause, they did not demur to the bill nor did they see fit to file an answer thereto prior to the time of the entry of the order in question. They were served with notice that an application would be made for the appointment of a receiver and their solicitors appeared at the hearing. They offered no evidence in opposition to the application and the record fails to show that they objected to the appointment. In fact, a statement made to this court, by the solicitor for the complainant, upon the oral argument of the cause, that defendants made no objection at the hearing to the appointment of a receiver, passed unchallenged, the solicitor for defendants frankly stating that they were satisfied to stand upon the alleged defects in the bill and the verification to the same.

The interlocutory order of the Circuit court of Cook county is affirmed.

AFFIRMED.

Sullivan, P. J., and Gridley, J., concur.

verified this position, or by means of the testimony
 for such an appointment. A further fact is that the
 so one of the witnesses that the appointment of the witness was
 not sufficient to support the fact of appointment, especially
 in view of the failure of testimony in the trial court. This
 they stated their appointment in the court, and not before
 to the jury, and they did it to this an answer which is
 to the fact of the jury in the court in question. They were
 served with notice that an appointment would be made for the
 appointment of a receiver and their notice was received at the
 hearing. They either so advised an appointment as to the
 appointment and the record fails to show that they objected to
 the appointment. In fact, a statement made at this court, by
 the witness for the respondent, that the court ordered of
 the court, that testimony was an objection at the hearing to
 the appointment of a receiver, granted notwithstanding, the witness
 for respondent frankly stated that they were willing to stand
 upon the alleged failure in the bill and the verification to the
 court.

The testimony given of the clerk's report of work
 seems to indicate.

Witness, J. H. and George, &c. consent

37250

CHICAGO TITLE & TRUST COMPANY, a

Corporation, as Trustee,

(Complainant) Appellee,

v.

EDWIN F. KUHLMANN, et al,

(Defendants)

ARNOLD J. WIECK and ALMA WIECK,

(Defendants) Appellants.

APPEAL FROM

INTERLOCUTORY ORDER

APPOINTING RECEIVER

ENTERED IN SUPERIOR

COURT OF COOK COUNTY.

273 I.A. 618²

Opinion filed January 9, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by defendants, Arnold J. Wieck and Alma Wieck, from a decree of the Superior Court of Cook County in a suit to foreclose a mortgage trust deed, appointing a receiver for the property described in the bill.

The bill alleges inter alia that on February 25th, 1927, Edwin F. Kuhlmann, Rose Kuhlmann, Arnold J. Wieck and Alma Wieck, being indebted to the holders of certain interest bearing bonds, 19 in number, aggregating the sum of \$25,000.00, all maturing at certain periods within five years from February 25th, 1937, executed and delivered to the Chicago Title & Trust Company, as trustee, a mortgage trust deed to the premises described in the bill of complaint, said deed being so made, executed and delivered for the purpose of securing the payment of the aforesaid bonds. The trust deed pledged the rents, issues and profits as additional security for the payment of the amount of the bonds. The trust deed also provided that the mortgagors should pay all lawful taxes, and that in case default should be made in the due and punctual payment of any of the principal bonds or the payment of any interest, and such default should continue for a period of 30 days, then the whole of the principal secured by the trust deed, together with the interest accrued thereon, should at the option of the holder of any of the bonds, become due and payable, and further,

THE UNITED STATES OF AMERICA

IN SENATE

January 9, 1934

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REPORT OF THE

COMMISSIONER

OF THE

INTERNAL SECURITY

Opinion filed January 9, 1934

THE COMMISSIONER OF THE INTERNAL SECURITY

has the honor to acknowledge the receipt of your letter of the 1st instant.

It is noted that you are in receipt of the letter of the 1st instant.

It is noted that you are in receipt of the letter of the 1st instant.

Very respectfully,
J. Edgar Hoover

THE COMMISSIONER OF THE INTERNAL SECURITY

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Very respectfully,
J. Edgar Hoover

THE COMMISSIONER OF THE INTERNAL SECURITY

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that in case default should be made in the due and actual payment of the principal of any of the bonds, or of any interest due, and such default in payment should continue for a period of 30 days, that the trustee should have the right to take possession of the premises and receive compensation for its services. It is further provided by this trust deed that in addition to the right of entry in case of default, that the said trust deed might be foreclosed and the mortgaged property sold, and that in case of the filing of any bill to foreclose the mortgage trust deed, that the court might at any time, either before or after the sale, and without a notice and without regard to the value of the premises, appoint a receiver for the benefit of the legal holder of the bonds, with the power to collect the rents, issues and profits pending foreclosure.

The bill further alleges that but one of the bonds for the sum of \$2,500.00 due February 25th, 1933, has been paid, that there have been defaults in the payment of principal and interest, and that by the terms of the bonds and trust deed, there was due and unpaid on account thereof on August 18th, 1933, a total sum of \$26,874.45. The bill contains the following allegation:

"That the complainant is informed and believes and therefore states the fact to be that the premises sought to be foreclosed herein are located in Franklin Park, and are improved with a one and a half story frame residence with brick foundation, and with a one story frame residence and five greenhouses, one three car frame garage, and that the value of said buildings, together with a tract of land of approximately five acres upon which such buildings are located, is less than \$20,000.00."

Further,

"That complainant is informed and believes and therefore states the fact to be that there are unpaid general taxes aggregating the sum of \$335.36 for the year 1931."

The bill recites that unless a receiver be appointed for all the premises described in the trust deed, pending the hearing of complainant's bill of complaint, complainant will lose a large sum of money, and that the premises are scant, meager and inadequate

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security for the indebtedness due, and that it is necessary for the protection and interest of the complainant and the bondholders that a receiver be appointed to collect the rents, issues and profits during the pendency of the suit.

The following affidavit is attached to the bill:

"Ralph K. Bell, being first duly sworn, on oath deposes and says that he is the duly authorized agent of the complainant in the above entitled cause, and that he makes this affidavit in its behalf.

Affiant further says that he has read the above and foregoing bill of complaint subscribed by the said Chicago Title & Trust Company, as trustee, and knows the contents thereof.

Affiant further says that the matters and things therein stated are true in substance and in fact except as to those matters and things which are therein stated to be made upon information and belief, and as to those matters he believes them to be true."

Appellant, Alma Wiecek filed an answer to the bill in which she denies that the mortgaged premises is worth less than \$30,000.00, and that it is scant security for the debt. Defendant also filed and submitted to the court on the hearing of the motion for the appointment of a receiver the affidavits of three real estate dealers, who stated respectively that the mortgaged premises were worth \$39,600.00, \$41,250.00 and \$40,800.00. None of the allegations as to the maturity of the debt, or the defaults in payment, are denied.

After a hearing on the bill, answer and affidavits in support of the answer, the court entered the order appealed from, appointing a receiver for the mortgaged premises.

Defendants points made on appeal as set forth in the brief, are as follows:

1. (a) "Even though the rents were expressly pledged in the trust deed as security and it authorizes the appointment of a receiver, the court should not make such appointment where it would be inequitable to do so."
- (b) "The rents, issues and profits of mortgaged premises remain the property of the owners and are but security for the debt."
- (c) "The burden of proof to establish grounds upon which

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the receivership is asked as inadequacy of security, is upon the mortgagee."

2. "The bill of complaint in this case must be construed most strongly against the complainant (appellee) and most favorably to appellants, and appellee must support an order granting it affirmative relief by a sufficient record and showing."
3. "When the appointment of a receiver is based upon a bill of complaint, the allegations supporting the appointment of a receiver must be positively verified."
4. "An allegation 'that the property is scant and insufficient security' will not support the appointment of a receiver, but the burden is upon complainant to present facts by a verified bill showing the necessity for such appointment."
5. "The complainant does not make such a case by its bill of complaint as will warrant the appointment of a receiver. Complainant made no showing that the property is insufficient security for the indebtedness sought to be foreclosed. On the contrary, the record affirmatively shows that the security is ample."

It is not disputed that since August 25th, 1928, when \$2,500.00 was paid, there has been no payment of either interest or principal on the indebtedness represented by the bonds and secured by the trust deed sought to be foreclosed, a period of more than five years; that the sums agreed to be paid are long overdue, and that a large amount of taxes are due and unpaid. Stated briefly, the total of defendants' grounds, urged for a reversal of the order appointing the receiver, is that there is not sufficient showing in the bill that the property pledged is insufficient security for the payment of the debt, and that the bill is not properly verified. As to the allegation in the bill upon which complainant draws its conclusion that the property pledged is worth less than \$30,000.00 and is scant security, and to which defendants object as not sufficient, this court said, in Jurik v. Marcinkiewicz, 308 Ill. App. 627 (Abstract opinion):

"The original mortgage was for \$27,000 of which a portion had been paid and it is alleged in the bill that the sum of \$22,000 is now due and owing, and that the property described is scant security, and that the fair reasonable cash market value of the property is less than \$22,000. It is also alleged that the rents, issues and profits arising are pledged as additional

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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will add you to Henry's family list as a future back issue add

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10-13-1968

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Red Power said that it is unclear in the bill that the man of

1. The first part of the document is a list of names and addresses, which appears to be a directory or a list of contacts. The names are written in a cursive script, and the addresses are listed below them. The list includes names such as "John A. Smith", "Mary E. Jones", and "Robert L. Brown".

1944-1945

security. To this bill a sworn answer was filed, in which it is alleged that the fair cash market value of the mortgaged property is \$23,000. A hearing was had on the motion, bill and answer. On the hearing it was admitted that the general taxes on the property for 1928 and 1930 had not been paid. The principal contention of appellant is that the allegation as to the value of the property being scant security for the indebtedness is insufficient. Counsel objects to the statement in the bill that 'in the opinion of your orator, the present market of the property is less than \$23,000.' It is insisted that the allegation as to the value must be categorical. It is impossible for any one having so much as is termed an expert knowledge of real estate values, to give more than an opinion as to value. Such evidence is received and justified in condemnation and all other cases where this question is in issue. What more exact testimony could any witness give as to the value of real estate, than his honest opinion. There is nothing to this point."

In the case at bar the bill alleges on information and belief that the mortgaged property is worth less than \$30,000.00, which we deem to be a sufficient allegation.

Counsel insists that the affidavit attached to the bill is not sufficient. The maker of the affidavit swears "that the matters and things therein stated are true in substance and in fact except as to those matters and things which are therein stated to be made upon information and belief, and as to those matters, he believes them to be true." The matters and things alleged in the bill to be true on the information and belief of the maker of the affidavit and which we deem to be material to this inquiry, are as to the value of the mortgaged premises, and this is stated on information and belief so that there is no question as to what is meant.

In Hulse v. Hulse, 332 Ill. 500, the Supreme Court said:
page 506:

"The affidavit as to the representations made on information and belief is in the identical form approved in Farrell v. Haiberg, 263 Ill. 407, but appellee insists that that part of the affidavit is defective because it is impossible to tell what is sworn to positively and what is sworn to on information and belief. He states that the form should be, 'except as to those matters therein stated to be on information and belief.' It is true that an affidavit that the facts in a pleading 'are true, except so far as they are stated on information and belief,' has been held defective in failing to distinguish between matters stated on the pleader's own knowledge and those stated on information and belief. (Christian Hospital v. People, 223

Ill. 244.) Such an affidavit, instead of referring the court to the pleading to ascertain what is represented to be on information and belief, requires a search of the mind of the pleader for what he intended to assert on information and belief. That, in our opinion, is not true of the affidavit in this case. Its words are, 'except as to matters therein set forth on information and belief.' We see no reason to depart from our former holding that that form is good in cases of this kind. The decision in Barrell v. Heiberg, supra, was cited and approved in Jackson v. Cinnas, 287 Ill. 382. The petition in this case clearly discloses all that is stated therein on information and belief and the matters of fact that are positively averred and charged to be facts.'" (Italics ours).

We are of the opinion that upon the showing made, the court was fully justified in appointing the receiver and the decree and order of the Superior Court is affirmed.

AFFIRMED.

WILSON AND REBEL, JJ. CONCUR.

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and money of the Government is different.

There are three questions in connection with the receiver and the receiver

as well as the money that goes into the receiver, the

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36860

HERBERT E. MITLER,
Appellee,

vs.

FIRE INSURANCE COMPANY OF
CHICAGO, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 618³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

I. This is an appeal by defendant from a judgment in the sum of \$12,500 in favor of plaintiff entered upon the finding of the court, motions for a new trial and in arrest having been overruled. The action was in assumpsit. The declaration consisted of the common counts and a special count, which in substance alleged that on May 14, 1928, plaintiff subscribed for 200 shares of the capital stock of defendant corporation at \$62.50 a share; that the subscription agreement entered into between plaintiff and defendant provided that defendant should become incorporated under the laws of Illinois, with an authorized capital stock of \$2,000,000, divided into 30,000 shares, of the par value of \$25 each, to be sold for \$62.50; that organization and promotion expenses and commissions should not exceed ten per cent of the amount actually paid in cash upon subscriptions; that defendant should have a paid-in capital stock of \$2,000,000 and a paid-in cash surplus of \$3,000,000; that plaintiff paid \$12,500 and received 200 shares of the capital stock; that defendant was incorporated under the insurance law of the state of Illinois but did not have a capital stock paid in of \$2,000,000 and a surplus paid in of \$3,000,000, as promised, but on the contrary the surplus paid in was only \$1,234,450; that when plaintiff discovered this fact he rescinded the contract and offered to return the stock and demanded the return of the \$12,500, which defendant refused to do.

Defendant filed a plea of the general issue and a special

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273. A. I. 812

PROBATION DEPARTMENT, NEW YORK
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plea, in substance, that plaintiff with knowledge of defendant's financial structure accepted the shares of stock in exchange for interim certificates held by him and afterward offered to sell them, thus waiving any right he may have had to object to such capital structure.

The evidence for the most part consists of the writings of the parties and was submitted by stipulation.

II. Defendant submitted propositions of fact and law, and the rulings of the court thereon clarified the issues between the parties.

At the request of defendant the court held that defendant executed and delivered the subscription agreement on May 14, 1928; that on June 14, 1928, plaintiff paid to the persons associated for the purpose of organizing the sum of \$12,500, and that said sum came into the possession of defendant upon its incorporation; that on the same date the incorporators of defendant delivered to plaintiff two interim certificates, each for 100 shares of the capital stock of defendant, showing said shares in the name of Perez Huff, and that said certificates were endorsed by Huff either in blank or to plaintiff; that on February 3, 10, 17, 24, 1925, the charter of defendant was published in the Chicago Journal of Commerce, a paper of general circulation in the city of Chicago, Cook county, Ill.; that on August 9, 1929, the charter in the same form as published in the Chicago Journal of Commerce in February and certified by the Department of Trade and Commerce of Illinois, together with a report of examination of defendant company, likewise certified, was filed in the office of the county clerk of Cook county, Illinois; that the capital named in the charter of defendant was \$2,000,000; that no surplus was mentioned in the charter; that the \$2,000,000 was paid in full and was held by defendant company in cash on August 9, 1929; that prior to August 9, 1929, the stock of defendant consisting

that, in addition, the plaintiff's attorney, who was not a member of the bar, was not admitted to practice in the court in which the case was heard. The plaintiff's attorney, who was not a member of the bar, was not admitted to practice in the court in which the case was heard. The plaintiff's attorney, who was not a member of the bar, was not admitted to practice in the court in which the case was heard.

Witnesses.

The witness for the plaintiff was the following:

The witness for the defendant was the following:

1. The witness for the plaintiff was the following:

The witness for the defendant was the following:

Witnesses.

The witness for the plaintiff was the following:

The witness for the defendant was the following:

The witness for the plaintiff was the following:

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The witness for the defendant was the following:

The witness for the plaintiff was the following:

of 85,000 shares had been fully subscribed at \$62.50 a share; that on August 9, 1929, a balance of \$1,789,860.75 was still unpaid upon subscription; that upon that date defendant was fully organized and was authorized to commence business and to issue policies; that within a day or two after December 15, 1929, plaintiff received notice that of the \$3,350,000 surplus \$1,834,450 had been collected on subscriptions, and that \$1,705,050 was represented by accounts receivable or due on surplus; that on January 2, 1930, plaintiff wrote defendant asking when its financial statement would be given out and what progress was being made in connection with the organizing and proceeding with its business; that shortly after January 7, 1930, plaintiff as a stockholder of defendant was notified by defendant that it was in a position to accept the various insurances governed by its charter; that defendant asked plaintiff for a record of his personal insurance requirements; that between January 7, 1930, and February 7, 1930, plaintiff attempted to place fire insurance upon his own buildings with defendant; that on February 25, 1930, plaintiff caused interim certificates representing 200 shares of stock subscribed for by him to be sent to defendant with a request that the stock be transferred to his own name; that on or about March 4, 1930, defendant caused new certificates called "temporary certificates" to be issued and sent to plaintiff, showing the stock issued in his name, and at the same time the 200 shares were entered on the stock books of defendant company, as standing in his name; that on or about April 15, 1930, plaintiff received notice that as of December 31, 1929, there was unpaid on subscriptions \$1,430,681; that between December 31, 1929, and June 1, 1930, defendant engaged in the business of writing fire insurance and wrote policies of such insurance under which it received net premiums aggregating \$3,685.50; that on June 7, 1930, plaintiff notified defendant that he desired to rescind his subscription agreement.

The court refused to hold as requested by defendant that on August 23, 1929, plaintiff received notice that about \$1,500,000 of subscriptions to surplus was being carried by the company as bills and accounts receivable, and refused to hold that at no time prior to the bringing of this suit did plaintiff notify defendant that he had rescinded his subscription agreement, and that at no time prior to bringing this suit did plaintiff offer to return to defendant the 200 shares of defendant's capital stock subscribed for by him, or the certificates representing such shares.

At the request of defendant the court held as a proposition of law that the surplus of a fire insurance company organized under the laws of the state of Illinois prior to the amendment of 1931 was not required by law to be fully paid up as a condition precedent to the granting of its charter and the valid commencement of its business; that for the effective rescission of a subscription agreement for stock of a corporation to be formed, the subscriber, as soon as he had knowledge of the facts giving a right to rescind, and prior to the institution of suit, must clearly and unequivocally convey to the corporation his intention to disaffirm and rescind the contract and ^{to} must offer to return it, the shares of stock subscribed.

The court, however, refused to hold as requested by defendant that the subscription agreement signed by plaintiff did not require that the surplus of \$3,000,000 should be fully paid up in cash as a condition precedent to the complete organization of the company and the valid commencement of its business. The court further refused to hold that plaintiff's subscription agreement was fully performed by defendant; that plaintiff by exchanging his certificates and having the stock transferred to his own name after he had notice of the fact that defendant was organized and authorized to begin its business with only part of its surplus paid up, waived and was estopped from asserting any right he otherwise might have had to recover the amount paid

by him upon his subscription agreement. The court also refused to hold as requested by defendant that by taking no action to rescind his subscription agreement and to recover the amount paid thereunder for over six months after he had notice of the fact that defendant was organized and was authorized to begin its business with only part of its surplus paid up, and after defendant had actually begun its business and written fire insurance policies on which the net premiums amounted to over \$3,685.60 during said period of over six months, waived and was estopped from asserting any right he otherwise might have had to recover from defendant the amount paid by him upon his subscription agreement.

Three controlling questions appear in the record: (1) whether the subscription agreement rightly interpreted requires that the surplus of the corporation which was to be organized should be fully paid in cash at the time of its complete organization; (2) whether, assuming the agreement should be construed as containing such requirement, plaintiff lost the right to rescind by what defendant called equivocation and delay; and (3) whether, assuming such construction, plaintiff waived his right to rescind by affirmative acts as a stockholder of the company.

III. As to the proper interpretation of the subscription agreement, the evidence shows that plaintiff at the time of these transactions conducted a business in New York where he resided. The promotion of defendant corporation was carried on in Chicago by parties residing there. The subscription agreement was dated May 14, 1928, and was prepared and submitted by the promoters of the defendant corporation who acted in behalf of the corporation to be organized. It will therefore be construed most strongly against defendant in case of ambiguity or doubt. Toffenetti v. Mellor, 323 Ill. 143.

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by him upon his resignation, "resigned". The only other reason is
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Revised, 1911, 1912.
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than that in the body of the instrument and immediately under "subscription agreement" appear these words: "Fire Insurance Company of Chicago, Suite 1800--208 South LaSalle street, Chicago, capital \$2,000,000, surplus \$3,000,000, \$62.50 per share." The agreement then recites that "the undersigned" (plaintiff) subscribes for 200 shares of the capital stock of a corporation organizing under the insurance law of the state of Illinois under the name of Fire Insurance Company of Chicago for the purpose of transacting the business of fire insurance and exercising all powers authorized to be exercised by any corporation organized under the act of 1869 as amended. Following the names and addresses of the incorporators is this statement:

"It is understood and agreed that said corporation is to have an authorized capital stock of *** \$2,000,000 divided into *** 80,000 shares of the par value of *** \$25.00 each, which are to be sold for *** \$62.50 each.

"It is further understood and agreed that no sum shall be used for commission, promotion, and organization expenses on account of any share of stock in this corporation, whether sold within or without this State, in excess of ten per cent of the amount actually paid in cash upon separate subscriptions for such stock, and the remainder shall be held or invested as authorized by the laws governing the investments of such incorporation, and held by the corporators, and by the directors and officers of such corporation after organization as bailees for the subscriber, to be used only in the conduct of the business of insurance by such corporation after having been licensed therefor by proper authority."

There is a further agreement as to the deposit of funds and securities "as bailees for the subscribers" and after the signature of plaintiff appear the words:

"Dated at Chicago, Illinois,
May 14, 1928.

Received from the subscriber upon the above contract the sum of \$.....(cash or check) forshares of stock in the Fire Insurance Company of Chicago, at \$62.50 per share or 2½ times its par value of \$25.00."

There follows in pencil the signature of Huff as representative.

June 14, 1928, plaintiff paid to the incorporators \$12,500, and this money came into the possession of defendant upon its incorporation, which took place August 9, 1929. At that time, June 14th, there was delivered by the incorporators to plaintiff two interim certifi-

[illegible][illegible]

There is a large amount of work to be done in the field of the history of the United States, and it is hoped that the following list of names will be of some service to the reader.

[illegible][illegible]

tificates for 200 shares of the capital stock of the corporation. These certificates stated that "Huff has subscribed for 100 shares of the capital stock of the Fire Insurance Company of Chicago, *** of the par value of \$25.00 per share, and has paid upon said subscription the sum of \$6250.00, at the rate of \$62.50 per share." It further stated that upon the organization of the company the legal holder of the certificate shall be entitled to receive a certificate for the shares upon the surrender of the interim certificate. Upon the same date, it appears, Huff duly endorsed these certificates to plaintiff.

Defendant says (and rightly) that the charter of the corporation issued by the director of trade and commerce February 28, 1928, shows that the incorporators declared that the capital stock of the company should be \$2,000,000, divided into 80,000 shares of the par value of \$25 each but did not mention any surplus whatsoever.

Defendant says (and rightly) that neither the statute under which the corporation was organized (see Chail's Ill. Rev. Stats. 1929, chap. 73, par. 134, sec. 6) nor the charter issued by the department of commerce required that the surplus should be paid in cash prior to complete organization; and further argues that apart from the statute, it is not necessary that all or any part of the corporation's capital should be paid in prior to corporate existence or prior to its right to begin business. Defendant cites the statutes and the authorities, which under the particular statutes there construed, so held.

Defendant further argues that the date of complete organization of the corporation is controlling, and, as we understand defendant, that the question here litigated could arise only on or prior to that date. It is said that the subscriber at the time of the organization of the corporation becomes a stockholder and that if the promoters have organized according to the subscription

agreement the contract has been fulfilled; that at that moment the subscriber becomes a stockholder; that he has then received that for which he has bargained, and that thereafter as a subscriber he may not complain; that if he has any right to complain, he must do so thereafter as a stockholder and not as a subscriber. McCoy v. Columbian Exposition, 186 Ill. 356; Norwich Co. v. Beckaday, 89 Va. 557, 16 S. E. 877; Newport Cotton Mill Co. v. King, 103 Tenn. 465, 53 S. W. 736, are cited.

As already stated, the statute under which defendant was organized did not require that the surplus of the corporation should be paid in cash, and the charter said nothing about surplus at all; but the question here is not whether this corporation was legally organized or whether it had a right to begin to do business. The question at issue is whether the corporation was organized and proceeded to do business in conformity with the promises contained in the subscription agreement which plaintiff signed. There is no complaint by plaintiff as to the date of the incorporation. Neither does the mere fact of the completion of the corporation, in the absence of other facts which would act as an estoppel, preclude plaintiff from rescinding the subscription agreement and recover back the consideration he paid. In this respect, it seems that defendant has misconceived the issue presented by the pleadings, and the authorities cited do not clarify but rather tend to confuse. After all, the question of first importance on the record involves the interpretation of the contract, and to a proper interpretation it is necessary, of course, to resort in the first place to the words of the contract and the language supposed to express the intention of the parties, which, when ascertained, is controlling.

It is true that the precise words used do not at any place in the subscription agreement say that the surplus is to be paid up. It does, however, describe the surplus in terms of dollars. Three

The following is a list of the names of the persons who have been received as subscribers to the "Journal of the American Medical Association" for the year 1917. The names are arranged in alphabetical order of the surnames. The names of the subscribers who have been received as subscribers for the first time are marked with an asterisk (*). The names of the subscribers who have been received as subscribers for the second time are marked with a double asterisk (**). The names of the subscribers who have been received as subscribers for the third time are marked with a triple asterisk (***). The names of the subscribers who have been received as subscribers for the fourth time are marked with a quadruple asterisk (****). The names of the subscribers who have been received as subscribers for the fifth time are marked with a quintuple asterisk (*****). The names of the subscribers who have been received as subscribers for the sixth time are marked with a sextuple asterisk (*****). The names of the subscribers who have been received as subscribers for the seventh time are marked with a septuple asterisk (*****). The names of the subscribers who have been received as subscribers for the eighth time are marked with an octuple asterisk (*****). The names of the subscribers who have been received as subscribers for the ninth time are marked with a nonuple asterisk (*****). The names of the subscribers who have been received as subscribers for the tenth time are marked with a decuple asterisk (*****).

millions, the number used to express the amount of the surplus, is preceded by the dollar sign, and to the average person that means cash. If it may fairly be said that considering the words used standing alone and separated from the context, the meaning is ambiguous, nevertheless when all the language of the subscription agreement, as well as the circumstances and undisputed facts with reference to the transaction, is considered there seems to be no doubt of the interpretation. The agreement states, for instance, that the 80,000 shares of the par value of \$25 each "are to be sold for ** \$62.50 each." A simple computation shows that a sale of all the shares at that price would produce a surplus of exactly \$3,000,000. In another part of the agreement it provides that no more than ten per cent "of the amount actually paid in cash upon separate subscriptions" shall be used for commissions and promotion and organization expenses. This indicates the further intention of the parties that the cash received for the capital stock and surplus should be carefully guarded from the acquisitiveness of the promoters. If there was any doubt in this respect it would be removed by the receipt of Huff which appears at the end of the subscription and which expresses the sale of the shares of stock "at \$62.50 per share or $2\frac{1}{2}$ times its par value of \$25.00."

The conclusion becomes irresistible when we consider this transaction as a whole and its purposes. Plaintiff paid \$12,500 in cash, representing a definite interest in the capital and the surplus of a corporation to be organized, and the amounts of that capital and surplus were definitely stated. The record would indicate that plaintiff is a business man of some discretion. Why would it be supposed he would pay cash for that interest, while promoters might sell to others equivalent interests for cash to only two-fifths of that amount? Such a transaction would have been improvident on his part. It is true that the law in effect at this time did not require

that the surplus should be paid in cash prior to the completion of the corporation, but that was a matter of public rather than private interest. He was concerned with his own contract. It is significant, however, that the law of the State in this respect was changed by a subsequent enactment (see Cahill's Ill. Rev. Stats. 1931, chap. 73, par. 134, sec. 6) which created as a condition precedent to any such corporation doing business that its surplus should be paid in cash.

It also appears that while not yet mandatory by statute, it has been the custom of the Insurance Department to require an insurance company to incorporate in its charter a statement of the amount of the authorized surplus and a declaration that the same had been paid in cash. Indeed, by a positive statute (see Cahill's Ill. Rev. Stats. 1929, chap. 73, pars. 181-182) the law provided in substance that no fire insurance company might represent in any advertisement any funds or assets to be in the possession of such company not actually available for the payment of losses by fire, and that "every advertisement * * shall exhibit the capital actually paid in, in cash, and the amount of net surplus of assets as allowed by the Auditor of Public Accounts of the State of Illinois * * but no such advertisement * * * shall include or contain any declaration or statement respecting any authorized or subscribed capital, save only so much thereof as shall have been actually paid in in cash and possessed by the company."

The report of the examiner of the department of insurance, which is in evidence, refused to allow as assets of the company accounts receivable amounting to \$1,765,550, and reduced the allowed surplus of defendant by that amount.

Further, the correspondence between the parties and the advertisements of defendant corporation which are in evidence show that subsequent to this agreement defendant construed it as an agreement that the entire surplus, as well as the capital, would be

paid in, in cash. Such subsequent construction of a contract by one of the parties to it is persuasive. Gillett v. Teal, 272 Ill. 106. It is unnecessary to describe the advertisements of the defendant company which appeared in the Chicago newspapers in detail. These advertisements stated in glowing terms that a \$5,000,000 company was forming and that the capital was \$2,000,000 and the surplus \$3,000,000. We cannot presume that by such advertisements defendant intended to violate the laws of the State or to insert misleading advertising. Moreover, section 8 of the act applicable to fire insurance companies (see Cahill's Ill. Rev. Stats. 1929, chap. 73, par. 136, sec. 8) provided, in substance, that such surplus would be allowed only if it had been paid in in cash and was retained either in cash or in government bonds or other securities provided by that section. The prospectus which plaintiff received prior to subscribing for the stock expressly stated that "the surplus, however, is available as working capital." This could be true only if the surplus was paid in cash and either held as cash or invested in the securities approved by section 8 of the act. We think it quite unnecessary to recite in detail the extended correspondence between the parties, all of which is to the same effect and which we think no thoughtful person can read without coming to the conclusion in that when/this stock subscription the term "capital" or "surplus" was used it was the intention of the parties that it should in each case represent cash paid into the company.

IV. Such being the interpretation of the contract it remains for determination whether plaintiff with knowledge waived his right to rescind or by affirmative acts with reference to the stock after the company was incorporated affirmed the contract in such manner as to waive his right to rescission. If we are correct in this interpretation of the subscription agreement there can be no

doubt that as a matter of law, upon ascertaining the facts, plaintiff had a right to rescind the agreement, return his certificates and receive back the money paid. Application of the elementary principles of contracts would compel that conclusion, and the authorities are quite agreed and unanimous to that effect. 2 Fletcher Cyc. Corp., p. 1147; Supervisors of Fulton County v. Miss. & Wabash R. R. Co., 21 Ill. 327; Middlecott Hotel Co. v. Taomenn, 92 Ill. App. 170; Owensboro Seating & Cabinet Co., v. Miller, 130 Ky. 310, are only a few of many authorities which might be cited. It is also clear there could be no duty cast upon plaintiff to give notice of rescission until such time as plaintiff had knowledge of the fact that defendant had completed its organization without providing for the cash surplus as agreed.

Defendant asked the court to hold as a matter of fact that plaintiff had notice of the situation on August 23, 1929, and that he took no action to rescind for over six months after he had notice that defendant had begun business with only part of its surplus paid up. The court refused to so hold, and we think rightly. Quite important in weighing the evidence is the fact that plaintiff was in New York with only such opportunity for knowledge as the promoters saw fit to give to him from time to time. The correspondence justifies the inference that the promoters were reluctant to give such information. Plaintiff was entitled to a frank disclosure of the whole situation. The court found the date of notice to plaintiff to be April 15, 1930, and that he then learned of a situation that had in fact existed from December 31, 1929.

June 7, 1930, plaintiff notified defendant of his desire to rescind the subscription agreement. In February he had exchanged the interim certificates for the stock certificates. The correspondence shows during all this time an endeavor on his part to extract from the promoters the actual situation. Under such

circumstances we hold that he is not estopped and cannot be held to be guilty of laches.

There is some suggestion that the intention to rescind and demand the return of his money lacked the necessary formalities.

On June 7, 1930, plaintiff's attorney wrote defendant:

"We represent Mr. Harbert E. Mitler of New York City, who subscribed for 200 shares of the capital stock of your company.

Mr. Mitler claims that his subscription was secured upon the representation that the Company to be organized would have a capital stock of \$2,000,000.00, and a surplus of \$3,000,000.00, all paid in cash, but that this program has not, in fact, been carried out, and he is therefore desirous of rescinding his subscription and securing the return of his money.

We should be pleased to discuss this matter with your counsel if you will advise us who is representing you."

On July 17, 1930, defendant's general counsel called on plaintiff's attorneys in Chicago, who informed defendant's counsel that the stock certificates were in New York but would be produced when wanted, and later there was some suggestion that defendant might arrange a purchase of the stock by way of settlement. It is now urged that this was an affirmative act amounting to waiver. We hold otherwise. Formalities are not important in such cases where the intention to rescind, as here, is apparent and clear. 13 Corp. Jur. 618; Bill v. Burgess, 134 Ill. App. 373; Black on Rescission & Cancellation, vol. 1, sec. 114, p. 351, also sec. 541, and vol. 2, sec. 536, p. 1320.

We think it unnecessary to further review the facts which are recited in the findings of the court.

We hold that the subscription agreement, rightly interpreted, provided that the surplus should be paid in cash, and that plaintiff had an undoubted right to rescind which he did not waive; that he is not estopped by any affirmative act, and that the necessary preliminaries for the enforcement of his right of rescission were met.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

36934

JULIUS A. BIRNO et al.,
Appellants,

v.

THE NORTHERN TRUST COMPANY,
a corporation, as administrator,
Appellee.

APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

273 I.A. 618'

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This appeal is by plaintiffs from a judgment in favor of defendant entered upon the finding of the court at the close of plaintiffs' evidence. The suit was in assumpsit for commissions claimed to be due under the terms of an agreement whereby plaintiffs undertook to find a purchaser for a business owned and controlled by Edward C. Wentworth in his lifetime. The declaration was upon this alleged agreement, and the common counts were added. Defendant pleaded the general issue, and the trial was by the court as above stated. Defendant administrator has not filed any brief in support of the judgment of the trial court.

The principal error assigned and argued is the exclusion by the trial court of evidence offered by plaintiffs.

It appeared that in the lifetime of Wentworth plaintiffs brought a suit in chancery in the Superior court of Cook county against Wentworth and others. The suit was for the purpose of obtaining discovery of whether the deal, on which plaintiffs claimed commissions, was actually consummated. The cause was referred to a master who made his report, but Wentworth died before a decree was entered. The suit was thereupon discontinued as to him and

JOHN A. BROWN & SONS
Manufacturers

v.

THE BOARD OF SUPERVISORS
of the County of Los Angeles,
a corporation, as administrators,
Deceased.

JOHN A. BROWN & SONS
Manufacturers

273 I.A. 618

IN SENATE
JANUARY 10, 1911

This appeal is by plaintiff's from a judgment in favor of defendant entered upon and signed at the court at the place of plaintiff's residence. The bill was in essence for commission claimed to be due upon the terms of an agreement whereby plaintiff undertook to find a purchaser for a business owned and controlled by plaintiff's father-in-law. The commission was paid this alleged agreement, and the terms thereof were agreed. Defendant pleaded the general issue, and the trial was by the court as above stated. Defendant's witnesses were not called and were not in support of the judgment of the trial court.

The principal error assigned and argued in the examination by the trial court of evidence offered by plaintiff.

It appeared that in the lifetime of plaintiff's father-in-law a sale in essence in the higher court of law was made against defendant and others. The sale was for the purpose of obtaining discovery of whether the sale, in which plaintiff's father-in-law was actually concerned. The case was referred to a master who made his report, and plaintiff's father-in-law was restored. The sale was therefore concluded as to him and

proceeded against the surviving defendants. Afterward this suit against the administrator of the estate of Wentworth was filed. In the chancery suit plaintiffs demanded from Wentworth an answer under oath, and this answer was filed.

Upon the trial of this cause plaintiffs offered in evidence as the first exhibit a certified copy of the bill of complaint in that suit, together with the answer in which Wentworth under oath admitted certain allegations contained in paragraphs of the bill. The court excluded this evidence upon objection by defendant on the theory that it was not admissible under section 2 of the Evidence act (Smith-Nurd's Ill. Rev. Stats. 1933, chap. 51, sec. 2) which provides in substance that no party to a civil action, suit or proceeding, or person directly interested in the event thereof, shall be allowed to testify therein of his own motion, or in his own behalf, in an adverse suit or defense as the executor, administrator, heir, legatee or devisee of any deceased person, unless when called as a witness by such adverse party so suing or defending, and except in certain other cases named.

The trial court, we think, misconstrued the language and misconceived the purpose of that statute. The answer under oath filed by Wentworth contained admissions by him of facts material. He was bound by such answer, and it was admissible in evidence against him. Schell v. Weaver, 128 Ill. App. 106, affirmed in 225 Ill. 159. The statute merely disqualifies certain persons as witnesses. It does not make either oral or written statements of a deceased person incompetent. The court erred in this respect.

Joseph J. Rausch was called as a witness and questioned with reference to a meeting with plaintiffs and Wentworth in the office of Bisno at which the witness was present. He testified that Wentworth at that time said his business was worth \$50,000

proceeded under the existing law. It was this that
 against the constitution of the state of New York.
 In the theory and practice of the law, it was
 under oath, and this answer was filed.
 Upon the trial of this cause, the plaintiff offered in evi-
 dence on the first day a certain copy of the bill of complaint
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 admitted certain allegations contained in paragraph of the bill.
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 theory that it was not admissible under section 2 of the Evidence
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2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 22

and that he would sell it at that price and promised to furnish figures and statements to the witness at a later date; that Bisno at that time said his commission was \$5,000. Attorney for plaintiffs then asked the witness what Wentworth said, but defendant objected, and the court sustained the objection. Attorney for plaintiff then offered to prove by the witness Rausch that about a week after August 10, 1929, he met Wentworth and Bisno in Bisno's office; that Rausch was introduced to Bisno; that Bisno told Rausch while Wentworth was there that Wentworth wanted to sell his business, etc. Apparently on the same theory the court excluded all this evidence. The decree entered in the chancery case was also offered and rejected. The witness was neither a party nor an interested person. The evidence was material and proper and should have been admitted. Boyd v. Jennings, 46 Ill. App. 290; Reish v. Cannon, 198 Ill. 219; Ruffy v. Ruffy, 243 Ill. 476.

The decree in the chancery suit was also competent for the purpose of showing that a part of the commission claimed had been assessed against other parties interested in the business which was sold. Bisno, one of the plaintiffs, offered to testify as to how much had been actually paid to him on account of the commissions under the decree after the death of Wentworth, but this evidence also was excluded. These payments concerned matters which ~~were made~~ occurred after the death of Wentworth. The witness was competent, and his testimony should have been received.

Plaintiffs argue that this court should reverse with a finding of facts and enter judgment here, because the uncontradicted evidence offered is sufficient to sustain such judgment. Prima facie, we think, it is sufficient, but the record before us fails to disclose that defendant closed its case, and for that reason the judgment, we think, must be reversed and the cause remanded.

REVERSED AND REMANDED.

McGuire and O'Connor, JJ., concur.

36944

NELLE E. POWERS,
Defendant in Error,

vs.

JOSEPH GARFIELD,
Plaintiff in Error.

63 A
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 6194

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case for personal injuries and upon trial by the court, there was a finding for plaintiff in the sum of \$10,000 with judgment thereon. The court also entered a special finding to the effect that defendant was guilty of wilful and wanton conduct in connection with the accident in which plaintiff was injured.

The declaration is in four counts. The first alleged that on July 10, 1931, plaintiff was riding in an automobile on a public highway in Champaign county, Illinois, at a point about one mile south of Ludlow on the State Bond Issue route No. 25, driving in a northerly direction; that defendant was driving an automobile in a southerly direction on the same route; that he negligently drove at a greater speed than necessary, and that while plaintiff was in the exercise of due care ran into and struck the automobile in which plaintiff was riding, demolishing the car and greatly injuring her. The second count averred general negligence. The third averred that defendant operated his automobile on that portion of the highway reserved for traffic proceeding in the opposite direction, and the fourth that defendant at the time and place was guilty of wilful and wanton negligence. Defendant filed a plea of the general issue and a special plea denying control and ownership of the automobile which collided with that in which plaintiff was riding.

Defendant contends that the trial court should have granted his motion made at the close of plaintiff's case to find in favor of defendant upon the theory that there was no proof of the operation

WILLIAM F. ...
Defendant in error.

vs.

JOHN ...
Plaintiff in error.

ST & I.A. 619

IN ...
... OF THE COURT.

... in an action on the part of the personal injuries and upon
... trial by the court, there was a finding for plaintiff in the sum
of \$10,000 with interest thereon. The court also entered a decree
finding as the effect that defendant was guilty of willful and malicious
conduct in connection with the accident in which plaintiff was
injured.

The decision is in four counts. The first count that
on July 12, 1931, plaintiff was driving in an automobile on a public
highway in Christian County, Illinois, at a point about one mile
south of Indian on the State Road known as Route No. 10, driving in a
northerly direction; that defendant was driving an automobile in a
southerly direction on the same road; that he negligently drove
at a greater speed than necessary, and that while plaintiff was in
the vicinity of the car he had then and struck the automobile in which
plaintiff was riding, resulting in the car and thereby injuring her.
The second count stated general negligence. The third averred that
defendant operated his automobile so that portion of the highway to-
wards the north proceeding in the opposite direction, and the
fourth count determined as the time and place was guilty of willful
and wanton negligence. Defendant filed a plea of the general issue
and a special plea denying control and ownership of the automobile
which caused the loss in which plaintiff was riding.
Defendant contends that the trial court should have granted
his motion made at the close of plaintiff's case to find in favor

or control of defendant's automobile. He, however, did not elect to stand upon his motion, but thereafter proceeded to introduce evidence in his own behalf. He thereby waived any error, if there was any, in the denial of his motion. Bennett v. Ill. Power & Light Co., 271 Ill. App. 182.

Defendant also contends that as a matter of law plaintiff was guilty of contributory negligence and cites cases, of which there are many, holding that a plaintiff who is not in the exercise of due care may not recover. However, the trial court found that the negligence of defendant was wilful and wanton, and in such case contributory negligence is no defense. Hoske v. O'Donnell, 260 Ill. App. 854.

He also argues that the amount of the judgment is grossly excessive, but the evidence is clearly to the contrary. Plaintiff did not testify in the case. The evidence in the record shows that she was taken to the hospital immediately after the collision in which she received her injuries; that there was a swelling above the eyes and in the face, particularly on the left side of the head; that the forehead was over the left eyebrow and over the left side of the nose was lacerated; that some of her teeth were knocked loose; that there was a laceration of the lower lip; that ^{there was} a discoloration and swelling in the left shoulder and upper left part of the chest; that her right hip was fractured and both knees dislocated; that there was a comminuted fracture of the acetabulum, which is the hip joint socket; that her injuries were permanent and that she now has a deformity of the upper sternum due to fracture at that time. The attending physician also testified that plaintiff also had a severe brain contusion which produced unconsciousness for a period of weeks and which produced at times mental irresponsibility.

The contention of defendant, apparently most relied upon,

is that the finding and the judgment are against the manifest weight of the evidence. Defendant was the only witness who testified in his behalf. The evidence tends to show that plaintiff was injured as a result of a collision which took place on the State Bond Issue route No. 25 about one mile south of Ludlow, Illinois, and about at the top of an incline in this highway. Plaintiff resided at Benton, Illinois, and on the morning of July 10, 1931, left her home for the purpose of making a trip to Ludington, Michigan. She was riding in a new Dodge sedan driven by her son Robert, sixteen years of age at the time. The evidence tends to show that he had had some experience in handling automobiles, had driven for about a year and was familiar with the mechanism of cars and the rules of driving. Plaintiff sat in the front seat by her son and two little girls, one her daughter, were riding in the back seat. They left home on the day in question at 4:30 in the morning; it was a bright, clear day. At about ten o'clock in the morning they were driving in a northerly direction on the east side of the pavement at the place in question at a speed of about forty miles an hour. At the same time defendant was driving a Studebaker automobile in a southerly direction on the highway. In the car with him was his wife and child who was a little over five years old. The evidence as to his driving is conflicting. That for plaintiff tends to show that he was driving south at a speed of more than 60 miles an hour. Defendant says that he was going about 50 miles an hour. The pavement here was about 18 feet wide and in the center of it was a black line. Travelers coming north would go on the east side of the line, those traveling south on the west side of it. The evidence for plaintiff is to the effect that as defendant proceeded south he was straddling this black line in the center of the pavement, thus invading that part of the road designed for travelers going in the opposite direc-

tion. Defendant says he was driving on the west side of the black line and that he was west of it when the accident occurred. He says that he could see plaintiff's automobile as it approached; that he saw it first when it was about 200 feet south of him. The driver of plaintiff's car testified that by reason of the incline he was unable to see the car of defendant as it approached. Defendant says that the collision occurred on the west side of the black line. All the other evidence is to the effect that defendant was driving on the east side of the black line when the collision occurred. Many facts and circumstances indicated that the witnesses for plaintiff gave the true account of the matter.

As already stated, defendant was the only witness who testified in his behalf, and his testimony is contradicted by the driver of plaintiff's car and in particular by a disinterested witness, Joseph Baudison, who was "hitch-hiking" on the road at that time. Carl Witt, who at that time held the position of state policeman and who was patrolling the highway and visited the scene of the accident immediately after it occurred, testified that the wheel on the front left hand side of the Dodge car was smashed back and broken down and the windshield broken, the engine block cracked and the fenders smashed; he said he examined the Studebaker car and that the front wheel was pushed back; that it was towed away without a derrick; he also said he examined the pavement and observed a lot of glass on the right hand side going north; that there were scratches in the pavement where the impact had caused the car to slide on the right hand side of the pavement; that the scratches were to the right of the black line.

James Sheahan, keeper of a garage at Ludlow, testified that he cleared away the wreck shortly after the accident; that when he went there he found the Dodge car on the right hand side of the road, on the east side of the road and headed into the ditch; that the Studebaker was on the left hand side of the road; that it had

been pushed off the road.

Under such evidence there was clearly an issue of fact, on which the finding of the court is entitled upon review to the same weight as the verdict of a jury. We cannot say the evidence preponderates in favor of defendant; on the contrary we hold that it clearly preponderates in favor of plaintiff.

Defendant earnestly contends that there was no proof that would justify the finding of wilful and wanton conduct on his part. The evidence shows without contradiction that the elevation of the road at this point created a dangerous situation, of which it was the duty of any careful ^{driver} ~~xxx~~ to take notice. The evidence for plaintiff tends to show that with full knowledge of this situation defendant drove his car at a great rate of speed and straddled the black line in the center of the road, whereas it was his duty, under the circumstances, to keep clearly to the right of it. The question of whether this conduct was wilful and wanton and the weight of the evidence in that regard were for the trial Judge, who seeing and hearing the witnesses had advantages in weighing the evidence which this court does not possess. We think this question also is one which must be regarded as settled conclusively by the finding of the court.

Defendant also contends that the court erred in admitting improper evidence, but where the trial is by the court without a jury, it will be presumed upon review that the trial judge in making his finding disregarded any evidence improperly admitted, provided there was sufficient evidence in the record upon which to base his finding. This record contains such evidence.

The judgment of the trial court is affirmed.

AFFIRMED.

36991

E. A. MINICHES & CO., a Corporation,
Appellee,

vs.

ERNEST RICKETTS,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 1.A. 619²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$693.68 entered on the finding of the court.

Plaintiff's statement of claim discloses a demand for moneys alleged to be due for certain china and glassware which, it is averred, were sold and delivered to defendant by plaintiff September 24, October 22 and October 26, 1932.

The affidavit of merits denies that the goods in question were purchased by defendant but avers that all of the merchandise was sold to Ernest A. Ricketts, Inc., and denies that defendant is obligated to pay for any part of the same.

It was stipulated that the goods were delivered at the premises known as 524 Davis street in Evanston, where a restaurant was conducted under the name "Ernest A. Ricketts, Inc."; that this restaurant was conducted there by defendant, and that the prices claimed were as agreed.

The sole question in the trial court therefore was whether the goods were sold to defendant or to this corporation of which he was president, and the controlling issue in this court is whether the finding of the court is against the manifest weight of the evidence.

The evidence shows that plaintiff company was a dealer in china and glassware in Chicago, and employed in its business a salesman named Waters. In the early part of 1931 defendant conducted a restaurant at 2727 North Clark street, Chicago. At that time and thereafter he lived at 609 Wellington avenue, two blocks

M. A. HICKS & CO., a corporation,
Appellee.

vs.

THOMAS HICKS,
Appellant.

Case No. 100-10000

STATE OF ILLINOIS

COUNTY OF CHICAGO

223 A. 619

IN SENATE JANUARY 1911
DELIVERED THE OPINION OF THE COURT.

This is an appeal of defendant from a judgment in the sum

of \$600.00 entered on the finding at the trial.

Plaintiff's statement of claim discloses a demand for

money alleged to be due for certain claims and disbursements.

It is averred, were sold and delivered to defendant by plaintiff

September 24, October 22 and October 26, 1908.

The affidavit of service shows that the goods in question

were purchased by defendant and were sold all of the merchandise

was sold to Ernest A. Hickox, Inc., and service upon defendant is

obliged to pay for any part of the same.

It was stipulated that the goods were delivered at the

premises known as 224 Davis street in Evanston, where a restaurant

was conducted under the name "Ernest A. Hickox, Inc."; that this

restaurant was conducted there by defendant, and that the prices

claimed were as agreed.

The sole question in the trial court therefore was whether

the goods were sold to defendant or to his corporation at which

he was president, and the controlling issue in this court is

whether the finding of the court is against the weight of

of the evidence.

The evidence shows that plaintiff company was a dealer in

olives and pickles in Chicago, and employed in its business a

salesman named Waters. In the early part of 1908 defendant con-

ducted a restaurant at 224 Davis street, Chicago. At that

time and thereafter he lived at 202 Wellington avenue, the place

away. Waters' testimony is that he called on defendant at this restaurant in 1931 and submitted samples of his goods; that defendant was apparently interested, and the salesman from time to time thereafter called on him. Defendant's testimony is that he sold this restaurant at 2727 North Clark street to his brother in September, 1931, and that he first met the salesman of plaintiff, Waters, there about August, 1932, when his brother was in fact the owner of the restaurant; that he (defendant) was only visiting there. However that may be, defendant admits that the salesman quoted prices to him; that he was often around 2727 North Clark street thereafter, and that defendant gave to Waters the number of his home address and told him that he was interested in a restaurant about to be opened at 524 Davis street, Evanston.

At any rate, plaintiff under date of August 25, 1932, prepared quotations on wares and mailed them to defendant at his home address, together with a letter addressed to him there, stating that the price list was enclosed and further that "some time within the next week I will arrange to see you." Quotations on other goods followed on September 1, 7, 16, 17 and 22, 1932.

Waters testified that these quotations were sent at the personal request of defendant; that on September 23, 1932, he met defendant by appointment at the office of an architect in Evanston where defendant gave him a verbal order of the goods. The following day Waters made out an order on the printed stationery of Onondaga Pottery Co., Syracuse, New York, the written portions of which were in his own handwriting. At the top of this memorandum is written "Ricketts" and at the bottom, also in script, "For Ernest Ricketts."

September 26, 1932, plaintiff mailed a confirmation of the order given to "Mr. Ernest Ricketts, 1004 E. Clark St., Chicago, Ill." Waters said that this confirmation was sent to that address at the request of defendant. Other price lists were sent

any. Waters' testimony is that he called on defendant at this restaurant in 1931 and admitted seeing him there; that defendant was apparently interested, and was salesman from time to time thereafter called on him. Defendant's reply only is that he sold this restaurant at 5737 North Clark Street to his brother in September, 1931, and that he later met the salesman of defendant's estate, there about August, 1932, when his brother was in fact the owner of the restaurant; that he (defendant) was only visiting there. However that may be, defendant admits that the salesman quoted prices to him; that he was given about \$250 for the restaurant; and that defendant gave to Waters the number of his home address and told him that he was interested in a restaurant about to be opened at 544 Davis Street, Evanston.

At any rate, defendant under date of August 25, 1932, prepared quotations on water and asked Waters to defendant at his home address, together with a letter addressed to him there, stating that the price first was reduced and further that "some time within the next week I will arrange to see you." Quotations on other goods followed on September 1, 7, 16, 17 and 23, 1932. Waters testified that these quotations were sent at the

personal request of defendant; that on September 23, 1932, he met defendant by appointment at the office of an architect in Evanston where defendant gave him a verbal order of the goods. The following day Waters made out an order on the printed stationery of

Chonahaga Battery Co., Chicago, New York, the written portions of which were in his own handwriting. At the top of this memorandum is written "Wickste" and at the bottom, also in script, "for Ernest Wickste".

September 26, 1932, defendant mailed a confirmation of the order given to "Mr. Ernest Wickste, 1044 N. Clark St., Chicago, Ill." Waters said that this confirmation was sent to that ad-

to defendant on September 30 and October 20, 1932, which were addressed "Mr. Ernest Ricketts."

October 24, 1932, plaintiff wrote:

"Mr. Ernest Ricketts,
1004 N. Clark St.
Chicago.

Dear Mr. Ricketts:

The following is a copy of order placed with us for your new location, 524 Davis St., Evanston, Illinois:

| | |
|--------------------------|-----------------|
| 1/2 dozen hot water pots | \$4.35 per doz. |
| 3 dozen teapots 10 oz. | 12.95 per doz. |

The above is decorated with brown color lines and tracings Ivory body.

Thanking you for this business, we are,

Yours truly,

E. H. Minrichs & Co."

Again, on October 28, plaintiff wrote:

"Mr. Ernest Ricketts,
1004 N. Clark St.
Chicago.

Dear Mr. Ricketts:

We are giving you below copy of order which you placed with us for your afternoon Tea Service for your new location, 524 Davis St., Evanston.

Overglaze Pembroke-- White Body

| | |
|------------------|------------------|
| 3 1/2 dozen Cups | \$8.65 per dozen |
| 3 " Saucers | 5.05 " " |
| 3 " Plates 8" | 5.40 " " |

Again thanking you for this business, we are

Yours very truly,

E. H. Minrichs & Co."

Defendant says (and Waters denies) that at the time the orders in question were given he told Waters that they were for the corporation. Apparently, for the purpose of explaining his failure to protest against these transactions being carried out in his name personally, defendant says that October 26th he went to the hospital where he underwent an operation, and that he did not see the invoices which were all made out to him personally, until about the middle of December; that he then called up plaintiff's place of business and told a girl with whom he talked to change the billing to Ernest Ricketts, Inc.

The charter for the Ernest A. Ricketts, Inc., a corporation,

to defendant in 1941 and 1942, which were

" 41701019 " 1 " 111 " 1000000000

... ..

SECRET

1938-1939

[illegible]

The above is decorated with brown color lines and twofold every body.
Thanking you for this business, we are,
Yours truly,
A. J. Stephens & Co."

Again, on October 27, plaintiff wrote:

1. The first of these is the fact that the
the first of these is the fact that the
the first of these is the fact that the

1944, 1945, 1946

1. The following information was obtained from the review of the file of the above named individual:

Again thanking you for this business, we are
Yours very truly,
W. A. Matthews & Co.,
315 Main St.,
Boston, Mass.

The charter for the Kenneth A. Rickette, Inc., a corporation
the billing to Kenneth Rickette, Inc.

was issued by the Secretary of State of Illinois July 9, 1932, and it was recorded in the recorder's office of Cook county July 18, 1932. Defendant, as already stated, was the president of the corporation. The lease for the restaurant in Evanston was in the name of the corporation and was dated August 19, 1932.

December 31, 1932, defendant wrote:

"E. A. Hinrichs & Co.,
58 E. Washington Street
Chicago, Illinois.

Gentlemen: In regards to your invoice of December 30th, I wish to inform you that our invoices should be billed to Ricketts, Incorporated.

We also wish that you would pick up the old dishes which we have here in stock.

Yours truly,
Ricketts, Incorporated
Ernest A. Ricketts, Pres.
E. A. Ricketts, Pres."

EAR:EMS

In response to this letter new invoices billing the goods to the corporation were sent, and as already stated, the goods were delivered to 524 Davis street and received by persons employed in and about the restaurant there.

We think the above is a fair recitation of the material facts appearing in the record. The issues on this record seem to raise questions of fact which would have been for the decision of a jury if the case had been tried by jury. As the case was tried by the court, these questions were for the court, whose finding upon them, upon review of this court, is entitled to the same weight as the verdict of a jury.

There is some complaint about evidence admitted over objection, but where the case is tried by the court, such ruling, even if erroneous, is not reversible if there is evidence in the record upon which the court could reasonably base its findings.

There is no reversible error in this record and the judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

APPROVED,

of the trial court is therefore affirmed.
There is no reversible error in this record and the judgment upon which the writ would reasonably base its findings.

It appears, is not reversible if there is evidence in the record that, but when the case is tried by the court, even if, errors, is not reversible if there is evidence in the record that, upon review of this court, is entitled to the same weight as the court, these questions were for the court, whose finding upon trial if the case had been tried by jury. As the case was tried by a raise questions of fact which would have been for the decision of a facts appearing in the record. The issues on this record seem to be about the restaurant where.

delivered to 524 Davis street and received by persons employed in to the corporation were sent, and as already stated, the goods were In response to this letter new invoices billing the goods

BAR:225

"A. Nichols, Pres."
"A. Nichols, Pres."
"A. Nichols, Pres."
"A. Nichols, Pres."
"A. Nichols, Pres."

we have here in stock.
to also with that you would pick up the old dishes which
Right? Incorporated.
I wish to inform you that our invoices should be billed to
Chicago, Illinois.
28 W. Washington Street
R. A. Nichols & Co.,

December 21, 1932, defendant wrote:

name of the corporation and was dated August 19, 1931.
corporation. The laws for the restaurant in Houston was in the
1932. Defendant, as already stated, was the president of the
it was recorded in the recorder's office of Cook County July 18,
was issued by the Secretary of State of Illinois July 2, 1932, and

37006

GUST FLAKOTOS,
Appellee,

vs.

DAVID GERMAIN et al.,
Appellants.
On Appeal of JOHN ORPHAN,
Appellant.

65
A
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

273 I.A. 619³

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action on the case begun August 28, 1931, against David Germain, David Germain, Jr., Beverly Weiss and John Orphan, and upon trial by jury (the cause having been dismissed by plaintiff as to David Germain, Sr., and Beverly Weiss) there was a verdict of guilty as to John Orphan, with damages assessed at \$2500 and a verdict of not guilty as to David Germain, Jr. Motions in behalf of Orphan for a new trial and in arrest were overruled and judgment was entered against him on the verdict, from which he appeals.

The declaration was in three counts. The first charged that plaintiff sustained injuries as a result of the negligence of defendants on January 26, 1931, at the intersection of Harlem and North avenues in Cook county, Illinois, when a motor vehicle in which plaintiff was riding, driven by Orphan, collided with another automobile driven by Germain, Jr.; that plaintiff was in the exercise of due care, and that defendants drove their automobile negligently. The second count alleged that defendants were negligent in failing to keep a proper lookout. The third count charged wilful and wanton negligence, and this was withdrawn before the cause was submitted to the jury. Defendants pleaded the general issue. There was a motion by defendant Orphan at the close of all the evidence that the court instruct the jury to find in his favor, which was denied, and this is the first alleged error argued.

The evidence showed without contradiction that defendant was injured January 26, 1931, as a result of a collision when the

JUST PLACED,
 Appellee,
 vs.
 DAVID GERMAIN et al.,
 Appellants.
 On Appeal of JURY VERDICT,
 Rehearing.

JAMES H. HARRISON, CLERK
 OF THE COURT.

2731.A.619

THE JURY VERDICT
 REHEARING THE DECISION OF THE COURT.

In an action on the case begun August 20, 1931, against David Germain, David Germain, Jr., Beverly Jones and John Graham, and upon trial by jury (the cause having been dismissed by plaintiff as to David Germain, Jr., and Beverly Jones) there was a verdict of guilty as to John Graham, with damages assessed at \$2500 and a verdict of not guilty as to David Germain, Jr. Motion in behalf of Graham for a new trial and in arrest were overruled and judgment was entered against him on the verdict, from which he appeals. The decision was in favor of the plaintiff. The first charge that plaintiff sustained injury as a result of the negligence of defendant on January 20, 1931, at the intersection of Taylor and North Avenue in Cook County, Illinois, when a motor vehicle in which plaintiff was riding, driven by Graham, collided with another automobile driven by Germain, Jr.; that plaintiff was in the driver's seat of the car, and that defendant drove negligently. The second charge alleged that defendant was negligent in failing to keep a proper lookout. The third charge charged with and without negligence, and this was withdrawn before the cause was submitted to the jury. Defendant pleaded the general issue. There was a motion by defendant Graham at the close of all the evidence that the court instruct the jury to find in his favor, which was denied, and this is the first alleged error assigned. The evidence showed without contradiction that defendant was injured January 20, 1931, as a result of a collision when the

automobile driven by Orphan collided with another automobile driven by Germain, Jr.; that plaintiff at that time was riding in Orphan's automobile as the guest of Orphan. Orphan therefore contends that plaintiff may not recover by reason of paragraph "b" of the act approved July 2, 1931, (see Laws of Illinois, 1931, p. 779). That act amends section 42 of the Motor Vehicle act approved June 30, 1919. The paragraph in question is as follows:

"Provided, however, that no person riding in a motor vehicle as a guest, without payment for such ride, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or its owner or his employee or agent and unless such wilful and wanton conduct contributed to the injury, death or loss for which the action is brought."

The wilful count having been withdrawn, and it appearing that plaintiff was riding with defendant Orphan as his guest, it is now urged that this section was applicable, and that the instruction requested should have been given for that reason.

The accident occurred January 26, 1931; the amendment to the Motor Vehicle law, of which the above quoted paragraph is a part, was approved July 2, 1931. The instant suit was begun August 23, 1931. The real question therefore raised by this contention is whether the amendment rightly construed has the effect of taking away the right of action which accrued prior to its enactment. Defendant Orphan contends that is its effect and cites Vanninwagen v. City of Chicago, 61 Ill. 31, followed in Vance v. Rankin, 194 Ill. 625, and Pooler v. Southwick, 200 Ill. App. 301.

As plaintiff points out, there is no doubt that under the common law and independent of any statute, a plaintiff guest had a right of action against his host for negligence by which he was injured. Warput v. Reading Coal Co., 250 Ill. App. 450; Lasley v. Crawford, 223 Ill. App. 590. This amendment to the statute contains no language indicating that it was the intention of the legislature

that the amendment should be retroactive, and it is argued persuasively that such statute will not be given a retrospective effect unless it is clearly manifest from the language thereof that the legislature intended it should have that effect.

The Appellate court for the Fourth district has held that this particular amendment is not retroactive in Baumesiter v. Bowers, 271 Ill. App. 332, and that construction is, we think, compelled from a consideration of the authorities. In People v. Deutsche Gemeinde, 249 Ill. 132, it was held that a law in force July 1, 1909, exempting certain property from taxation could not be availed of as against a tax levied April 1, 1909. In Richardson v. U. S. Mortgage Co., 194 Ill. 259, it was held that the act of May 26, 1897, which provided that a foreign corporation which failed to comply with that act could not maintain a suit, could not be construed to take away the right which had accrued under a prior act of 1875, giving such corporation the right to loan money and bring suit in this State. The court there said that such statute would impair the obligation of a contract.

In Brennan v. Electrical Installation Co., 120 Ill. App. 461, it appeared that Mrs. Brennan sued on a right of action which accrued to her under a statute of the state of Mississippi, giving a right of action for negligence causing the death of her husband. It appeared that Brennan died in July, 1899. The suit was begun in January, 1900. While the action was pending on May 13, 1903, an act was passed by the Illinois legislature which, it was claimed, rightly construed, provided that no action should be brought or prosecuted in Illinois to recover damages for a death occurring outside the State. Although there were no express words of repeal, it was contended that this act had the effect of repealing the former act of 1853, which permitted such actions to be maintained

that the amendments should be retrospective, and it is assumed that
actively that such statute will not be given a retrospective effect
unless it is clearly manifest from the language thereof that the
legislature intended it should have such effect.

The Illinois court in the Wentworth case held that
this particular amendment is not retrospective in Wentworth v.
Wentworth, 271 Ill. App. 430, and that consideration is, we think, con-
sidered from a consideration of the authorities. In People v.
Wentworth, 271 Ill. App. 430, it was held that a law in force
July 1, 1900, extending certain property from taxation could not be
valued of as against a law passed April 1, 1900. In Wentworth v.
U. S. Mortgage Co., 194 Ill. App. 430, it was held that the act of May
30, 1907, which provided that a certain corporation which failed to
comply with laws that could not maintain a suit, could not be com-
pelled to take any such suit. Also was decided under a similar act
of 1905, giving such corporation the right to loan money and bring
suit in this state. The court there held that such statute would
be retroactive in its effect.

In Trenn v. Illinois, 190 Ill. App. 430,
1907, it appeared that Mrs. Trenn sued on a right of action which
accrued to her under a statute of the state of Mississippi, giving
a right of action for negligence causing the death of her husband.
It appeared that Trenn died in July, 1905. The suit was begun in
January, 1906. While the action was pending on May 15, 1905, an
act was passed by the Illinois legislature which, it was claimed,
rightly amended, provided that no action should be brought or
presented in Illinois to recover damages for a death occurring
outside the state. Although there were no express words of repeal,
it was contended that this act had the effect of repealing the
former act of 1905, which permitted such actions to be maintained

in the courts of this State. This court reviewed the authorities, and distinguishing VanInwegen v. City of Chicago, 61 Ill. 31; County of Kenard v. Kincaid, 71 Ill. 587, and other cases, held, citing Richardson v. Akin, 87 Ill. 138, "There is a vested right in an accrued cause of action." We said:

"Vested rights cannot be destroyed, divested or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of rights and the constitutional limitations upon the exercise of the sovereign powers." Lewis Sutherland on Statutory Construction, section 671, and cases there cited.

"But there are other reasons for not holding the act of May 13, 1903, retroactive. There is a general rule, that no statute will be construed to operate retrospectively unless the intent that it shall do so is manifested by clear and unequivocal language. Jimison v. Adams Co., 130 Ill. 558; Gage v. Nichols, 135 Ill. 128; People v. McClellan, 137 Ill. 352; Fisher v. Green, 142 Ill. 80; Voight v. Kersten, 164 Ill. 314; Moore v. Chicago Surety Fund Soc., 178 Ill. 202; In re Day, 181 Ill. 73; Richardson v. U. S. Mortgage & Trust Co., 194 Ill. 259."

In Arnold & Murdock Co. v. Industrial Com., 314 Ill. 251, our Supreme court distinguished the right granted under a public law from those which had become the property of an individual and said:

"No one has a vested right in a public law, but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law. (Dobbins v. First Nat'l Bank, 112 Ill. 553.) *** A statute can only be given a retroactive effect where it does not impair contracts or divest vested rights. Lane's Appeal, 57 Conn. 182, 14 A. S. R. 94."

Defendant Orphan in his reply brief cites Board of Trustees of Ill. & Michigan Canal v. City of Chicago, 14 Ill. 334, but that case considered only inconsistent statutes which related to the manner in which land might be appropriated for public purposes. There was no question in the case of vested rights.

If, as the declaration alleged, plaintiff was injured by defendant's negligence, the cause of action thereupon accrued which had all the qualities of a vested right, and the subsequent statute could not take it away from him. We hold the court did not err in

in the case of the receiver and the transmitter.

[illegible]

County of ... State of ...

[illegible]

1. The first of these is the fact that the

"Vested rights cannot be destroyed, divided or impaired by direct legislation. Their protection is one of the primary purposes of government. They are secured by the bill of Rights and the constitutional limitations upon the exercise of the sovereign powers." Lewis Carroll as Attorney General, Session 671.

[illegible]

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law from those which had become the property of an individual and
 our supreme court decided the right granted under a public

: 2. 2. 2.

"No one has a vested right in a public law, but the Legislature may repeal or amend all legislative acts not in the nature of contracts or private rights. Such repeal or amendment, however, cannot have the effect of extinguishing claims which have been acquired under the law." (In re Estate of Lippitt, 107 Cal. 683.)

"A statute can only be given a retrospective effect where it does not impair contracts or vested rights." (Lane's Appeal, 57 Conn. 182, 14 A. 2d 94.")

element Ozburn in his early brief cites 10 of thirteen

OF THE CITY OF NEW YORK, IN SENATE,
JANUARY 11, 1900.

case considered only I consent to enter into the

1. The first step is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the situation.

There was no objection in the case of vessel 11.

12. As the declaration alleged, plaintiff was injured by defendant's negligence, the cause of action thereupon accrued which had all the qualities of a vested right, and the subsequent statute would not take it away from him. He held the court did not err in

denying defendant's motion for an instruction in his favor.

Defendant next contends that the court erred in denying his motion for a new trial because, as he says, the verdict of the jury was against the manifest weight of the evidence. The controlling facts in this case are quite simple. Harlem avenue is a public highway in Cook county extending north and south. North avenue is a public highway extending east and west. Both streets were from 40 to 50 feet wide; Harlem avenue was all paved; North avenue had a 20 foot highway on each side of the street, with dirt in the center space; there were no street lamps at the intersection of these streets, but there were stop signs on both sides of each of them. The country about the intersection was vacant prairie, although Speros Kapos, who was riding in defendant Orphan's car, said there was "some sort of a little house" near by.

At the time in question plaintiff, with Speros, was riding south on the west side of Harlem avenue in a Ford coupe driven by Orphan. All three occupants sat together in the front seat. It was about eight o'clock in the evening. Orphan and Kapos testified that when Orphan's car approached the intersection it was stopped north of the curb of North avenue; they say they looked but saw no other car approaching from the west; Orphan says he then proceeded to cross the intersection at a speed of 20 to 25 miles an hour, and that when almost across the intersection he was struck by a Buick car which was proceeding on the south side of North avenue in an easterly direction and driven by Germain, Jr.

Germain, Jr., says that when he approached Harlem avenue and reached the intersection he looked but did not see Orphan's car; that he stopped at the southwest curb; that he started up his car in first speed and proceeded across the intersection at the rate of five miles an hour. He says he did not see Orphan's car prior to the collision, and that that car hit his automobile at the door on the right hand (evidently he meant the left hand) side of the car.

deputy defendant's action for an injunction in his favor.
Defendant next contends that the court erred in denying his
motion for a new trial because, as he says, the verdict of the jury
was against the manifest weight of the evidence. The controlling
facts in this case are quite simple. North Avenue is a public
highway in Cook County extending north and south. North Avenue is a
public highway extending east and west. Both streets were from 40
to 50 feet wide; North Avenue was all paved; North Avenue had a
20 foot sidewalk on each side of the street, with dirt in the center
space; there were no street lamps at the intersection of these
streets, but there were street signs on both sides of each of them.
The country about the intersection was vacant prairie, although
George Lingo, who was riding in defendant's car, said there
was "some sort of a little house" near by.
At the time in question of 1911, when George, was riding
south on the west side of North Avenue in a road coach driven by
Orphan. All these circumstances are stated in the front part. It was
about eight o'clock in the evening. Orphan and Lingo testified that
when Orphan's car approached the intersection it was stopped north
of the curb of North Avenue; that they both looked but saw no other
car approaching from the west; Orphan says he then proceeded to
cross the intersection at a speed of 10 to 15 miles an hour, and
that when Orphan's car had reached the intersection he was struck by a light
car which was traveling on the north side of North Avenue in an
easterly direction and driven by Herman, Jr.
Orphan, Jr., says that when he approached North Avenue and
reached the intersection he looked but did not see Orphan's car;
that he stopped at the southeast curb; that he started up the car
in first gear and proceeded across the intersection at the rate
of five miles an hour. He says he did not see Orphan's car until the
collision, and that that was his recollection of the fact on

Orphan says his car was struck by the Buick on the right hand side and pushed over to the other side of the street.

Plaintiff testified that just prior to the accident he called, "John, John." Kapos says that he heard this call. Plaintiff says that he doesn't remember what happened after the car in which he was riding was struck. Photographs of the car driven by Germain, Jr., which were offered were excluded, and there is little or no evidence in the record as to the physical condition of the car from which many of the facts with reference to the collision could have been determined. Plaintiff's injuries were undoubtedly severe. There is no claim that the damages allowed are excessive. Without discussing the evidence in detail, we think it may be said that the questions of the negligence of defendants and of due care on the part of plaintiff were both for the jury, and that the controlling question in the case is raised by defendant Orphan's further contention that the court erred in giving to the jury the third instruction requested by plaintiff, which is as follows:

"In approaching a street intersection, it is the duty of the motor vehicle driver to exercise due care in looking out for vehicles approaching from the right hand side and to give such vehicles the right of way whenever, in the exercise of due care, it may appear to such motor vehicle driver that a vehicle approaching from the right is so near or is moving at such a fast rate of speed that a collision might occur unless the right of way were given to it."

Defendant Orphan argues that this instruction was apparently based on paragraph 34 of section 33 of chapter 95a, Cahill's Illinois Revised Statutes, 1933, which provides in substance that except as hereinafter provided motor vehicles traveling upon public highways shall give the right-of-way to vehicles approaching along intersecting highways from the right and shall have the right-of-way over those approaching from the left. Defendant Orphan says that it has never been held that this statute gives the right-of-way driver the absolute right to cross the intersection ahead of a driver on the left under any and all circumstances and conditions

Orphan says his car was struck by the truck on the right hand side and pushed over to the other side of the street.

Plaintiff testified that just prior to the accident he

called, "John, John." Orphan says that he heard this call.

Plaintiff says that he doesn't remember what happened after the

car in which he was riding was struck. Photographs of the car

driven by Orphan, No. 1, which were offered were excluded, and there

is little or no evidence in the record as to the physical condition

of the car from which any of the facts with reference to the col-

lision can have been determined. Plaintiff's injuries were un-

doubtedly severe. There is no claim that the damages allowed are

excessive. Plaintiff is asking the evidence in detail, we think is

may be said that the question of the negligence of defendant and of

the case on the part of Plaintiff were both for the jury, and that

the controlling question in the case is raised by defendant Orphan's

further contention that the court error is giving to the jury the

third instruction requested by Plaintiff, which is as follows:

"In approaching a street intersection, it is the duty of the motor vehicle driver to exercise the care in looking out for vehicles approaching from the right and to give such vehicles the right of way whenever, in the exercise of due care, it may appear to such motor vehicle driver that a vehicle approaching from the right is as near or is moving at such a fast rate of speed that a collision might occur unless the right of way was given to it."

Defendant Orphan argues that this instruction was apparently

based on paragraph 34 of section 31 of chapter 28, Civil's 1911-

his Revised Statutes, 1907, which provides in substance that every

as therein that provided motor vehicles traveling upon public high-

ways shall give the right-of-way to vehicles approaching along in-

tersecting highways from the right and shall have the right-of-way

over those approaching from the left. Defendant Orphan says that

it has never been held that this statute gives the right-of-way

driver the absolute right to cross the intersection ahead of a

driver on the left under any and all circumstances and conditions

of speed, and that this instruction is misleading because it informs the jury as a matter of law that defendant Germain, Jr., had the right-of-way over the intersection of Harlem and North avenues regardless of any rate of speed at which he was driving his car, if Orphan knew that a collision might occur unless the right-of-way was given. Orphan further says that under this instruction if Germain, Jr., came from the west on North avenue at 110 miles an hour, or at any other high or dangerous speed, it would be the duty of Orphan to calculate that speed and to give the right-of-way to the other car no matter how far back from the intersection this other car may have appeared to him to be; that the instruction therefore ignores any safety limits in speed of the traveler approaching from the right hand direction and ignores any duty on the approaching driver from the right to come through the intersection at a reasonable or lawful speed; that the instruction recognizes no limits in the speed at which Germain might approach the intersection, and that according to it the driver from the left must calculate the speed of the approach at his peril. It is said that the instruction is not in accordance with the statute but, on the contrary, violates its language and its meaning. Salmon v. Wilson, 227 Ill. App. 286; Heidler v. Wilson, 243 Ill. App. 89; Schwartz v. Lindquist, 251 Ill. App. 320; Riddle v. Manager, 254 Ill. App. 68, with other cases, are cited.

Plaintiff argues to the contrary, also citing and reviewing cases.

The question does not seem to be important on this record, since there was no evidence submitted by either of the parties tending to show that the car driven by Germain, Jr., approached the intersection at any unusual rate of speed. Granting, therefore, that the instruction is subject to criticism, its effect would be harmless in this case and the giving of it would not constitute

The fact that the car was not found in the vicinity of the bridge is a factor in the investigation. The fact that the car was not found in the vicinity of the bridge is a factor in the investigation. The fact that the car was not found in the vicinity of the bridge is a factor in the investigation.

reversible error. West Chicago Street Ry. Co. v. Maday, 198 Ill. 308; Greinke v. Chicago City Ry. Co., 234 Ill. 564. The questions at issue between the parties in this case must, it seems, be regarded as settled by the verdict of the jury, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

McSurely, J., concurs.

MR. JUSTICE O'CONNOR Dissenting: The question whether defendant David Germain, Jr., or defendant John Orphan was to blame for plaintiff's injuries was a close one.

During the cross-examination of defendant Orphan the court interjected: "Thy did you think you had the right of way? A. Because passing the middle of the intersection I think I have the right of way to cross there." At the request of plaintiff the court instructed the jury on the question as to who had the right-of-way at street intersections, which instruction is quoted in the opinion. That instruction, in my opinion, is clearly wrong and in this case was prejudicial to defendant Orphan. It practically told the jury, without qualification, that defendant Germain, who was approaching from the right, had the right-of-way. This is not the law. Ward v. Clark, 232 N. Y. 195; Erwin v. Traud, 90 N.J.L. 289; Paulsen v. Klinge, 92 N.J.L. 99; Spawn v. Goldberg, 94 N.J.L. 335; Salmon v. Wilson, 227 Ill. App. 286; Munns v. Chicago City Ry. Co., 235 Ill. App. 160; Heidler Co. v. Wilson & Bennett Co., 243 Ill. App. 89; Riddle v. Mansager, 254 Ill. App. 68.

RECEIVED

Defendant Davis, however, is not a defendant John Graham was to
 witness for Plaintiff's interest was a class one.
 During the course of the trial of defendant Graham the court
 instructed: "Why did you think you had the right to say? A. No-
 cause having the right of the instruction I think I have the
 right of say to grant leave." At the request of Plaintiff the
 court instructed the jury on the question as to who had the right-
 of-way at street intersection, which instruction is quoted in the
 opinion. That instruction, in my opinion, is clearly wrong and in
 this case was prejudicial to defendant Graham. It practically
 told the jury, without qualification, that defendant Graham, who
 was approaching from the north, had the right-of-way. This is
 not the law. Ward v. Ward, 228 Ill. 100; Ward v. Ward, 90
 Ill. App. 520; Ward v. Ward, 90 Ill. App. 520; Ward v. Ward,
 94 Ill. App. 525; Ward v. Ward, 97 Ill. App. 525; Ward v.
Chicago City Ry. Co., 255 Ill. App. 100; Ward v. Ward &
Ward Co., 255 Ill. App. 100; Ward v. Ward, 255 Ill. App. 100.

In Ward v. Clark, *supra*, 232 N. Y. 195, Judge Cardozo, in delivering the opinion of the court said (p. 198): "The defendant, it is said, had the right of way under the statute. 'Every driver of a vehicle approaching the intersection of a street or public road shall grant the right of way at such intersection to any vehicle approaching from his right.' (General Highway Traffic Law, sec. 12, subd. 4; Cons. Laws, ch. 70). The privilege thus conferred is not inflexible and absolute. A right of way, like a burden of proof, will establish precedence when rights might otherwise be balanced. It helps us little when without it the balance would be unequal. A right of way might turn the scales if, when the plaintiff started to cross, the cars had been equidistant, or nearly so, from the point of the collision, due regard being had also for the speed of their approach. Even with the distances what they were, it was an element which the triers of the facts were to consider in their estimate of conduct. That, in the circumstances of this case, is, we think, the extent of its significance. The plaintiff was not to wait until there was no other car in sight. Such a rule would be unworkable in crowded cities."

And in the Middle case, *supra*, 254 Ill. App. 68, Mr. Justice Jones, in speaking for the court said (p. 72): "One of the principal questions in the case is who had the right of way in the intersection, and on behalf of defendant Manager, the court instructed the jury in the language of the statute (Cahill's 1933 Statutes, ch. 95a, par. 34), that motor vehicles traveling upon public highways shall give the right of way to vehicles approaching along intersecting highways from the right and shall have the right of way over those approaching from the left. The statute does not authorize such assertion of the right of way regardless of circumstances, distance, or speed. It was error to give the instruction without proper qualification. (Munne v. Chicago City Ry. Co., 235

IN Ward v. Chicago City & Ry. Co., 1907, 130 Ill. App. 3d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Ill. App. 160; Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co., 243 Ill. App. 89."

The question put by the court and the giving of the instruction in effect eliminated the defendant Germain from the case, and this of course left only the defendant Orphan. I think the judgment should be reversed and the cause remanded.

37017

EDWARD GLICKAUF,
Appellee,

vs.

THE OHIO CASUALTY INSURANCE
COMPANY (OF HAMILTON, OHIO),
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

273 I.A. 619⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$91.95 entered upon the finding of the court in an action of the fourth class based upon an insurance policy, by which, as the statement of claim alleged and the proof tended to show, defendant undertook to indemnify plaintiff from loss by theft, pilferage or robbery of a Diamond T truck and its equipment.

The statement of claim averred and the proof tended to show that while the policy was in force on October 17, 1932, two 32 x 36 Firestone tires, tubes and rims, as well as a Boyce motometer and a radiator cap, were stolen from the truck. Defendant's adjuster replaced the motometer, but defendant denied liability for the tires. The affidavit of merits denied that the tires were covered by the contract of insurance and denied that they were stolen October 17, 1932, or were of the value of \$91.95, as alleged, and also denied that plaintiff complied with conditions precedent to recovery contained in the policy.

The main contention of defendant in the trial court was that the tires were not covered by the policy, and this contention required the construction of the insurance contract. It is a lengthy and quite complicated document consisting of several pages of printed matter in small type. The first page presents an apparently complete contract of insurance signed by the agent for the company. It purports, in substance, to insure an unencumbered Diamond T two-and-a-half-ton truck, Serial No. 42896, Motor No. T5-G, purchased by the insured in 1927 for \$3400 against "theft,

EDWARD GILBERT,

Applicant,

vs.

THE OHIO CASUALTY INSURANCE
COMPANY (OF KENTON, OHIO),
Appellant.

APPEAL FROM JUDICIAL DECISION

OF OHIO.

2731 A. 619

APPEAL FROM JUDICIAL DECISION
OBTAINED THE WRITING OF THE COURT.

This is an appeal by defendant from a judgment in the sum of \$101.68 entered upon the filing of two years in an action of the fourth class based upon an insurance policy, by which, on the statement of claim alleged in the trial found to show, defendant undertook to indemnify plaintiff from loss by theft, alliage or robbery of a Diamond T truck and its equipment.

The statement of claim averred and the trial found to show that while the policy was in force on October 17, 1935, two 32 x 36 firestone tires, used for time, as well as a spare motorometer and a radiator cap, were stolen from the truck. Defendant's adjuster refused the motorometer, the defendant denied liability for the tires. The affidavit of service stated that the tires were covered by the contract of insurance and stated that they were stolen October 17, 1935, or were of the value of \$11.75, as alleged, and also denied that plaintiff complied with conditions precedent to recovery contained in the policy.

The main contention of defendant in the trial court was that the tires were not covered by the policy, and this contention required the construction of the insurance contract. It is a lengthy and well complicated document consisting of several pages of printed matter in small type. The first page presents an apparently complete contract of insurance signed by the agent for the company. It recites, in substance, to insure an automobile Diamond T two-wheel-drive truck, serial no. 41332, Motor no.

robbery and pilferage" from January 30, 1932, to January 30, 1933, to the amount of \$800.

On the following page of the contract under the heading "damage to the automobile" and in article 3 thereof, certain exceptions are noted, one of which is "and excepting in any case, other than theft of the entire automobile described herein, the theft, robbery or pilferage of tools or repair equipment." Defendant contends that because of this provision plaintiff may not recover for the loss of these tires. It argues that the same must be held to be "repair equipment" and therefore are within the exception.

Defendant says that he has been unable to find an applicable case defining "repair equipment" but refers to Bouvier's Law Dictionary, 1928 ed., p. 1048, where it is said that to repair sometimes means to replace; also to The People v. Commissioners of Highways, 158 Ill. 197, where the opinion of the court states that "'to restore' and 'to renew' are given by lexicographers as synonyms of repair"; also to Funk and Wagnall's New Standard Dictionary, p. 2086, where repair is defined as "the process of repairing, restoration after decay, waste, injury, or partial destruction; supply of loss; reparation." Defendant contends that within these definitions it is clear that the policy should be construed as excepting from coverage, replacement equipment, and that spare tires fall within that category; that the words "repair equipment" must mean something in addition to tools; that if the word "replacement" or "renewal" is substituted in place of "repair" it is plain that spare tires would be within the exception.

The language used in this contract is by choice of the Insurance company. It is quite improbable that the insured ever read it, or knew of it, or regarded it as a part of the contract. Under such circumstances, a court will, if possible, construe the

to the amount of \$100.00

[illegible]

or "renewal" is indicated as one of "repair" it is plain that some something in addition to repair; even if the word "restoration" fall within that category; even the word "repair" must extend from exterior, structural elements, and that there are self-evident it is clear that the policy would be restricted as to scope of loss; restoration." But we cannot say within those restoration after heavy, wind, damage, or similar destruction; . 1980, where certain is defined as "the process of restoring types of repairs"; also we find the words "restoration Dictionary," "to restore" and "to renew" are used by lexicographers as synonymous, see III. 197, where the definition of the words reads that first sense to be lost; also in Restoration & Renewal.

cases defining "repair" especially in relation to building and also Deland says that he has been unable to find an explanation.

The language used in this contract is by choice of the language of the parties. It is this language that the parties have chosen to use in this contract. It is this language that the parties have chosen to use in this contract. It is this language that the parties have chosen to use in this contract.

language against defendant. Every doubt and ambiguity must be resolved in favor of plaintiff, and the entire language of the contract and all the circumstances examined to ascertain what was the real intention of the parties to it.

The proper construction will be found, as it seems to us, not so much by ascertaining the meaning of a particular word but rather by getting at the meaning of the phrase, "or repair equipment." The conjunction "or" seems to be the important word. Sometimes it is used, as the dictionaries indicate, to join together words conveying similar ideas. At other times, it is used to join together words conveying dissimilar ideas. Used in the first sense here, it would express the intention of the parties that the exception should cover tools and similar articles which are in no sense a part of the truck and never would become a part of it. If understood in the other sense, it would express the thought that articles dissimilar to tools, such as material for the repair of the truck which might at some time become a part of it, were also within the exception. Thus an ambiguity is created. If we turn to the other parts of the contract, we find that defendant asked plaintiff in his application to state the actual cost of the truck to assured, "including equipment." This would indicate that it was the intention of the parties that the equipment generally should be covered by the insurance. It is therefore possible to hold that the tires were not a part of the repair equipment within the meaning of the entire contract. The language used is that of defendant, presumably an expert in its line, and it is only fair to adopt the construction that will carry out the main and controlling intention of the parties, namely, to provide insurance. We think the trial court rightly held that the tires were covered by the policy.

Defendant further contends that there is no evidence in the record showing that the tires were attached to this truck. Plaintiff,

language against defendant. Every word is ambiguous and is re-
solved in favor of plaintiff, and the entire language of the con-
tract and all the circumstances examined to ascertain what was the
real intention of the parties to it.

The proper construction will be found, as it seems to us,
not so much by ascertaining the meaning of a particular word but
rather by looking at the meaning of the phrase, "or repairs equip-
ment." The construction "or" seems to be the important word. Some-
times it is used, as has been pointed out, to join together
words conveying similar ideas. At other times, it is used to join
together words conveying dissimilar ideas. Used in the first sense
here, it would connect the location of the parties with the equip-
ment which they use and which would be a part of it. If what-
ever of the truck was never used before a part of it. If what-
ever in the other sense, it would connect the truck with the equip-
ment which it is used for, and the result of the truck
which might be used before a part of it, and also within the
exception. Thus an ambiguity is created. If we turn to the other
parts of the contract, we find that defendant asked plaintiff in his
application to state the actual cost of the truck to be repaired, "in-
cluding equipment." This would indicate that it was the location
of the parties that was important. Generally should be covered by
the insurance. It is therefore possible to hold that the lines were
not a part of the repair equipment within the meaning of the entire
contract. The language used is that of defendant, presumably an
expert in the line, and it is only fair to adopt the construction
that will carry out his own and controlling intention of the
parties, namely, to provide insurance. We think the trial court
rightly held that the lines were covered by the policy.

Defendant further contends that there is no evidence in the
record showing that the lines were attached to the truck. Plaintiff

however, gave some testimony to that effect, and defendant without objection offered the sworn statement of Edward Horaky, which shows that the tires were kept in the body of the truck and were locked with an ordinary chain and padlock; further that it was the custom of plaintiff to carry two spare tires before the theft of these on October 17th. Defendant says that this statement was offered for impeaching purposes and therefore cannot be considered as substantive evidence or proof of the statement contained therein, citing Chicago City Ry. Co. v. Pence, opinion filed April 12, 1907, Gen. No. 13042. Horaky, however, did not testify, and the statement therefore could not have been for the purpose of impeaching him.

It is urged that plaintiff did not give immediate notice of loss to the police, as required by the policy. The evidence upon that point was conflicting, and the credibility of the witnesses was for the Judge, who saw and heard them testify. It is urged that there was no evidence that the truck from which the tires were stolen was the one covered by the policy, but we think there is evidence from which such fact might reasonably be inferred. Moreover, that fact was alleged in the statement of claim and not denied in the affidavit of merits.

It is urged that plaintiff did not comply with the conditions of the policy as to furnishing proof of loss. There was evidence tending to show such proof, but at any rate we hold that this point was waived by defendant's denial of liability and that it was unnecessary to plead the waiver. Bird v. Fire & Marine Ins. Co., 218 Mich., 266; American Central Ins. Co. v. J. E. Henninger & Co., 87 Ill. App. 440; Salduskas v. Robin, 250 Ill. App. 252; Cory v. Woodmen Accident Co., 253 Ill. App. 20; Ohio Power Shovel Co. v. Bond, 267 Ill. App. 271.

We think substantial justice was attained in this case,

and finding no reversible error in the record, the judgment of the trial court is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

and finding no reversible error in the record, the judgment of the trial court is affirmed.

THIRD.

O'Connor and Murphy, Jr., counsel.

37076

OVERMAN CUSHION TIRE COMPANY,
INC.,

Appellant,

v.

GENERAL TIRES, INC.,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 619⁵

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

April 18, 1933, plaintiff filed a statement of claim in the Municipal court, which averred that defendant was indebted by reason of a certain assignment of wages made to plaintiff by one A. E. Osborn for a valuable consideration September 8, 1932. The amount claimed was \$2,380, and the statement averred that March 18, 1933, plaintiff served on defendant a notice of the assignment and that it became the duty of defendant to withhold out of the wages and commissions of Osborn the said sum and to turn it over to plaintiff, which defendant failed and refused to do. A notice of the assignment was attached to the statement of claim and showed service of the same upon defendant March 18, 1933, at 10:50 o'clock a. m. The claim was duly verified, the affidavit averring that the sum of \$2,380 was due after allowing just credits, deductions and set offs.

A summons issued and was returned by the bailiff with the following notation of service:

"Served this writ on the within named General Tires, Inc., a corporation, by delivering a copy thereof to John Doe, agent, who refused to give true name, of said corporation and at the same time informing him of the contents thereof in the City of Chicago this 19th day of April, 1933.

"The president, clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor or other agent of said corporation not found in the City of Chicago."

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May 9, 1933, an order was entered by Judge Donald S. McKinlay finding that it appeared that defendant was personally served with process according to law; that defendant was in default for want of an appearance, and that default should be entered and damages assessed at \$2,380 with judgment thereon.

July 18, 1933, defendant made a motion supported by an affidavit before Judge Harold P. O'Connell to vacate the default and judgment. On that day an order was entered on plaintiff to file a counter affidavit in five days, and the motion was continued to July 26, 1933, at which time Judge McCarthy entered an order, giving defendant leave to amend the petition on the face instanter and to file an appearance and vacating the default and judgment of May 9, 1933. From that order plaintiff has perfected this appeal.

A motion was made in this court to dismiss the appeal upon the ground that the order appealed from was not final. The motion was denied but is reargued in defendant's brief. We, however, adhere to our former ruling upon the authority of Central Bond & Mortgage Co. v. Rosser, 323 Ill. 90; Welley v. Klein, 257 Ill. App. 171, and DeStefano v. Miles, 268 Ill. App. 353. As the motion to vacate was made more than thirty days after the entry of the judgment, the proceeding was necessarily under section 21 of the Municipal Court act (Cahill's Ill. Rev. Stats., chap. 37, sec. 21, par. 409.) That section provides:

"If no motion to vacate, set aside or modify any such judgment, order or decree shall be entered within thirty days after the entry of such judgment, order or decree, the same shall not be vacated, set aside or modified excepting upon appeal or writ of error, or by a bill in equity, or by a petition to said municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity: Provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court."

Defendant contends that the affidavit submitted by it sets

up facts which would be sufficient in equity to justify the setting aside of a judgment at law, while plaintiff contends that the statute directs that a petition must be filed in such case, and that this affidavit was no petition at all. Plaintiff says that an oral motion only was made, and in support of that motion the affidavit of Carl H. Van Binden was filed. It is true that the affidavit filed July 18, 1933, was executed by Carl H. Van Binden, who says that he is the president of the defendant corporation. The court seems to have regarded it as a petition, and we are disposed to consider it not under the name by which it is designated but rather with reference to the facts which it sets forth. Plaintiff cites DeStefano v. Miles, 268 Ill. App. 353. The opinion in that case states that "no petition nor any pleading in the nature of a petition" was presented to the trial court upon the hearing of the motion to vacate the judgment.

We have carefully read the affidavit filed by defendant July 18, 1933, in support of the motion, and find that it is a document which, whatever its technical deficiencies may be, is in the nature of a petition. Indeed, it seems to have been so regarded by the court and by the parties to the litigation in the trial court. We therefore hold that the affidavit filed was in the nature of a petition and that it was sufficient to give the court jurisdiction to consider the motion. Whether it was sufficient to justify setting aside the judgment is, of course, another matter. Upon the hearing, however, the court permitted an amendment to be made in open court by the attorney for defendant who added to the first paragraph of the affidavit the words, "and the defendant had no knowledge of said judgment prior to July 14, 1933." It does not appear that the affidavit was reverified by petitioner as thus amended, and the practice of permitting amendments to pleadings by way of erasures

up facts which would be sufficient in equity to justify the setting aside of a judgment at law, while plaintiff contends that the statute directs that a petition must be filed in such cases, and that this affidavit was no petition at all. Plaintiff says that an oral motion only was made, and in support of that motion the affidavit of Carl E. Van Linden was filed. It is true that the affidavit filed July 18, 1935, was executed by Carl E. Van Linden, and says that he is the president of the defendant corporation. The court seems to have regarded it as a petition, and we are disposed to consider it not under the name by which it is designated but rather with reference to the facts which it sets forth. Plaintiff cites DeLong v. Miller, 228 Ill. App. 205. The opinion in that case states that "no petition nor any pleading in the nature of a petition" was presented to the trial court upon the making of the motion to vacate the judgment.

We have carefully read the affidavit filed by defendant July 18, 1935, in support of the motion, and find that it is a pleading which, whatever its technical classification may be, is in the nature of a petition. Indeed, it seems to have been so regarded by the court, and by the parties to the litigation in the trial court. It therefore holds that the affidavit filed was in the nature of a petition and that it was sufficient to give the court jurisdiction to consider the motion. Whether it was sufficient to justify setting aside the judgment is, of course, another matter. Upon the facts, however, the court permitted an amendment to be made in open court by the attorney for defendant who added to the first paragraph of the affidavit the words, "and the defendant had no knowledge of the judgment prior to July 18, 1935." It does not appear that the affidavit was verified by plaintiff as thus amended, and the motion of plaintiff submitted to plaintiff by way of amendment

or interlineations has been heretofore condemned by this court.

Moorehead v. Briggs, 132 Ill. App. 361.

If, however, we regard the affidavit as a petition and this amendment as having been properly made, we think under circumstances such as appear in this record, it was insufficient to justify the order of court setting aside the judgment. The affidavit avers the institution of the suit April 18, 1933; that the summons was returned April 24th showing service on John Doe, agent, etc.; the entry of the judgment; that no execution was ever served; that July 14, 1933, the Northern Trust Co. notified "the affiant" (petitioner) that a garnishment summons was served upon the bank; that the statement of claim filed recited that September 8, 1932, A. E. Osborn made an assignment to plaintiff to secure \$2,380, and that March 18, 1933, a notice of said assignment was served upon defendant and judgment was prayed for that amount; that the statement of claim failed to allege that defendant was indebted to said Osborn in that sum or any other sum; that notwithstanding, the judgment was entered; that no proper service was ever had on defendant; that affiant is the president of defendant corporation, and that the return of the bailiff fails to disclose upon whom the summons was served; that the affiant has always been in Cook county and also at his place of business, on the date of the service of the summons; that the principal office of defendant is at 1111 West Jackson boulevard, Chicago, and that there was no reason why the summons should not have been properly served upon him; that the statement of claim is defective for failure to state that there was money due from defendant to Osborn at the time of the institution of the suit; that there were no moneys due Osborn and no moneys due under the assignment. Such is the substance of the affidavit or petition.

As already stated, the court ruled plaintiff to file

of information has been heretofore contained by this court.

North v. North, 111. P. 211.

It, however, is true that the affidavit as a petition and this court as having been properly made, we think under circumstances such as appear in this record, it was incumbent to justify the order of entry made under the judgment. The affidavit covers the jurisdiction of the suit until 18, 1935; that the summons was returned with showing service on John Lee, agent, etc.; and the entry of the judgment; that no execution was ever served; that July 18, 1935, the Northern Trust Co. notified the plaintiff (petitioner) that a judgment summons was served upon the bank; that the statement of claim filed recited that judgment of 1935; that the order made on judgment be satisfied by means of \$2,500, and that March 18, 1935, a notice of said judgment was served upon defendant and judgment was prayed for that amount; that the statement of claim failed to allege that defendant was indebted to said Capital Bank and on any other basis; that notwithstanding, the judgment was entered; that no proper service was ever had on defendant; that plaintiff is the president of defendant corporation, and that the return of the plaintiff fails to disclose upon whom the summons is served; that the plaintiff has always been in Cook county and also at his place of business, on the date of the service of the summons; that the principal office of defendant is at 111 West Madison Boulevard, Chicago, and that there was no reason why the summons should not have been properly served upon him; that the statement of claim is defective for failure to state that there is money due from defendant to Capital Bank at the time of the installment of the suit; that there was no money due Capital Bank and no money due under the judgment. Such is the substance of the facts of this case.

As already stated, the court ruled plaintiff to this

a counter affidavit, and in response to that rule, plaintiff filed the affidavit of one DeFee, who stated that he was an attorney at law associated with the firm representing plaintiff and since its inception had been in sole charge of the law suit; that March 13, 1933, he caused to be served upon defendant at 1111 West Jackson boulevard a notice of wage assignment executed by Osborn running to the plaintiff corporation; that having received no acknowledgment of this notice from defendant, he, March 21, 1933, addressed a communication to defendant, reciting the service of notice of March 13th of the assignment by Osborn and stating that the purpose of the communication was to inquire how soon the money due and owing by defendant to Osborn on the date of the wage assignment notice might be received; that receiving no acknowledgment of the assignment or of this letter, on March 30, 1933, he addressed another communication to defendant stating in substance that no reply had been received to the letter of March 21st and unless the information asked for was received by April 3rd, without further notice, additional measures would be taken; that having received no acknowledgment of either of the letters or of the notice of wage assignment on April 14, 1933, affiant called defendant on the telephone and explained to the switchboard operator that he was calling with regard to the U. S. Osborn matter and was referred by the operator to a Mr. Graham, who in response to an inquiry stated that he was the manager of defendant; that affiant told Graham that he was the attorney who had charge of the Osborn case, and that since no acknowledgment had been received of the notice of the wage assignment or of letters written, he was calling to inquire whether defendant owed Osborn any money on the date of the service of the notice, and, if so, whether defendant intended to turn it over to affiant without the necessity of a lawsuit; that Graham said that he would discuss the case with

a counter affidavit, and in response to that rule, Plaintiff filed
the affidavit of one Carter, who stated that he was an attorney at
law associated with the law firm representing Plaintiff and since the
investigation had been in the charge of the law firm, that since 1935
1935, he wanted to be served upon Plaintiff as Plaintiff Jackson
possessed a variety of legal documents executed by Carter running to
the Plaintiff Corporation; that having received no acknowledgment
of this notice from Plaintiff, he, March 11, 1935, addressed a
communication to Defendant, reciting the service of notice of
March 11th of the Plaintiff by Carter and reciting that the purpose
of the communication was to inquire how soon the money was being
by Plaintiff to Carter on the date of the legal assignment notice
might be received; that receiving no acknowledgment of the assign-
ment or of this notice, on March 20, 1935, he addressed another
communication to Defendant reciting in substance that he had
been served with the notice of March 11th and unless the information
asked for was received by April 25th, without further notice, additional
measures would be taken; that having received no acknowledgment of
either of the letters or of the notice of legal assignment on April 14,
Plaintiff called Defendant on the telephone and explained to the
Defendant's operator that he was calling with regard to the
money matter and was referred by the operator to a Mr. Graham, who
in response to an inquiry stated that he was the manager of Defendant,
and Plaintiff told Graham that he was an attorney who had charge
of the money matter, and that there was no acknowledgment had been re-
ceived of the notice of the legal assignment as of March 11th,
and was calling to inquire whether Plaintiff could obtain any money
the date of the service of the notice, and, if not, whether
Defendant intended to turn it over to Plaintiff without the necessary
a receipt; that Graham said that he would discuss the case with

one Van Sinden and would call affiant on the telephone at a later date; that not having heard from Graham or any other representative of defendant, on April 17, 1933, affiant again called Graham on the telephone to inquire concerning the matter and was told by Graham, "my company does not intend to do anything about the matter;" that suit was thereupon started April 18, 1933; that April 20, 1933, Graham called affiant on the 'phone and said that he had been served with a summons and asked affiant not to prosecute the case, stating that Osborn was no longer in the employ of defendant and adding: "I do not want my company to go to the expense of hiring a lawyer to defend the suit;" that affiant told Graham that he would not dismiss the suit and that it would have to be tried; that Graham then asked what would happen if neither he nor a representative of defendant appeared in court on May 1, 1933, and that affiant then answered that judgment for the full amount of the claim would be entered against defendant.

The affidavit of plaintiff's attorney further stated that affiant checked the records of the Municipal court and found no appearance had been entered by defendant; that again on May 9, 1933, affiant appeared in court and when the case was called neither a representative of defendant nor an attorney for that company responded and affiant thereupon took judgment for \$2,380; that May 10, 1933, Graham again called affiant on the telephone and asked what had occurred on May 1st and affiant told him judgment had been entered for \$2,380; that Graham said, "All you will have to do now is try to collect the judgment."

There was no denial of the material allegations of this counter affidavit. The facts which must be made to appear in order to invoke the powers of a court of equity to interfere with the enforcement of a judgment at law have been stated by the Supreme

one Van Linden and would call attention to the fact that as a last
 matter I am not aware of any other representative
 of defendant, on April 17, 1933, defendant again called Graham on the
 telephone to inquire concerning the matter and was told by Graham,
 "My company does not intend to be worrying about the matter;" that
 defendant thereafter called until 12, 1933; that until 20, 1933,
 Graham called defendant on the phone and said that he had been served
 with a summons and asked defendant not to prosecute the case, stating
 that Graham was no longer in the employ of defendant and adding, "I
 do not want my company to be so the expense of hiring a lawyer to
 defend the suit." That witness told Graham that he would not prosecute
 the suit and that it would have to be paid; that Graham then asked
 what would happen if witness he not a representative of defendant
 appeared in court on May 1, 1933, and that witness then answered that
 judgment for the full amount of the claim would be entered against
 defendant.

The affidavit of plaintiff's attorney further stated that
 witness checked the records of the telephone calls and found no
 appearance had been entered by defendant; that again on May 1, 1933,
 witness appeared in court and when the court was called neither a
 representative of defendant nor an attorney for that company appeared
 and witness thereafter took judgment for \$2,350; that May 10, 1933,
 Graham again called witness on the telephone and said that had
 occurred on May 1st and witness told him judgment had been entered for
 \$2,350; that Graham said, "All you will have to do now is try to
 collect the judgment."

There was no denial of the material allegations of this
 counter affidavit. The facts which were so stated in order
 to invoke the power of a court of equity to interfere with the
 enforcement of a judgment as has been stated by the Supreme

court in Bardonski v. Bardonski, 144 Ill. 284, and have been consistently followed by this court in the construction of section 21 of the Municipal Court act, where application for relief has been made by a petition in the nature of a bill in equity. It was said in that case:

"It is well settled that equity will not interfere with the enforcement of a judgment at law, unless the judgment debtor could not have availed himself of his defense at law, or was prevented from so doing by the fraud of the opposite party, or by accident or mistake unmingled with fault or negligence on his own part."

Of the many cases so holding we need cite only a few. Imbrie v. Bear, 230 Ill. App. 165; Izzi v. Lalongo, 248 Ill. App. 90; Welley v. Klein, 257 Ill. App. 171.

Defendant also contends that the statement of claim in this case fails to state a cause of action. Whatever the defects in this statement of claim may have been and decided by rules applicable to a declaration in the Circuit or Superior court, we think it reasonably informed defendant of the nature of the case he was called upon to meet. Capital State Svcs. Bk. v. Larson, 255 Ill. App. 479.

Defendant argues also (citing among other cases, Central Bond & Mortgage Co. v. Roesser, 323 Ill. 90) that the return of the bailiff was defective. However, in this case, defendant entered a general appearance which would waive any defects in the service. Moreover, the service was sufficient under the rule announced by the Supreme court in Berner v. Shong, 341 Ill. 478.

For the reasons indicated the order of the trial court setting aside the judgment is reversed.

REVERSED.

McSurely and O'Connor, JJ., concur.

37142

THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, a Corporation,
Appellee,

vs.

W. P. COONEY and T. S. KORSHAK, Being
Business as COONEY, KORSHAK, and
MARYLAND CASUALTY COMPANY, a Corporation,
Appellants.

68 17
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 6201

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action in debt upon a bond given upon issuing an attachment in aid and upon trial by the court, there was a finding for plaintiff with judgment thereon for \$820.23, from which defendant appeals.

The declaration alleged that on June 24, 1930, Cooney and Korshak prayed a writ of attachment in aid out of the Municipal court of Chicago against the estate of plaintiff; that they made their writing obligatory of that date with the Maryland Casualty Company as surety, whereby the makers jointly and severally acknowledged themselves to be bound by plaintiff in the sum of \$1,150, the condition of the bond being that Cooney and Korshak should prosecute their suit with effect or in case of failure pay costs and damages to plaintiff, in which case the obligation was to be void. The declaration averred that defendants did not prosecute the suit with effect, and that plaintiff incurred costs and damages to the amount of \$826.73. A copy of the bond sued on and an affidavit of claim were attached to the declaration.

Defendants appeared and filed a plea of the general issue and a plea that plaintiff ought not to have its action because the bond was not required by statute and because the same was made without any good or valuable consideration. An affidavit of merits was also attached, denying that plaintiffs were damaged in the sum of \$826.73 by reason of the attachment in aid sued out, and denying

THE NEW YORK, NEW HAVEN & HARTFORD
RAILROAD COMPANY, a corporation,
Appellee,

F. F. GOONEY and J. J. HERNANDEZ, being
business as GOONEY, HERNANDEZ, and
HARTFORD CASUALTY COMPANY, a corporation,
Appellants.

COUNT OF ROCK COUNTY,
ATTEST: THOMAS J. HENNING

273 I.A. 620

MR. PRESIDENT: JUSTICE KATCHEN
DELIVERED THE OPINION OF THE COURT.

In an action in debt upon a bond given upon issuing an
attachment in aid and upon trial by the court, there was a finding
for plaintiff with judgment thereon for \$280.73, from which de-
fendant appeals.

The declaration alleged that on June 24, 1920, Gooney and

Hernandez procured a writ of attachment in aid out of the Municipal
Court of Chicago, against the estate of plaintiff; that they made
their writing obligatory of that date with the Hartford Casualty

Company as surety, whereby the makers jointly and severally ac-

knowledge themselves to be bound by plaintiff in the sum of

\$1,150, the condition of the bond being that Gooney and Hernandez

should prosecute their suit with effect or in case of failure pay

costs and charges on plaintiff, in which case the obligation was to

be void. The declaration averred that defendant did not prose-

cute the suit with effect, and that plaintiff incurred costs and

damages to the amount of \$280.73. A copy of the bond sued on and

an affidavit of claim were attached to the declaration.

Defendant answered and filed a plea of the Federal issue

and a plea that plaintiff ought not to have its action because the

bond was not required by statute and because the same was made with-

out any bond or valuable consideration. An affidavit of merits was

also attached, denying that plaintiff's were damaged in the sum of

\$280.73 by reason of the attachment in aid sued out, and denying

that defendants were indebted. The affidavit further averred that the bond was demanded by the clerk of the Municipal court and that defendants signed it to obtain the attachment in aid, although it was not required by the statute, and that there was therefore no consideration.

Plaintiff filed a demurrer to the second plea, which was sustained, whereupon defendants filed a second amended plea, which averred that there was no consideration for the bond, and that it was not required by the statute; that plaintiff was a non-resident of the state and had no property in the state liable to be attached and that the attachment writ in aid issued upon the filing of the affidavit with the clerk of the Municipal court on June 24th was issued for the summons of persons named only as garnishees. An amended affidavit of merits was also filed. Plaintiff demurred to the amended plea and again the demurrer was sustained. Thereafter, defendants made a motion to vacate this order which was denied on December 3, 1932. Another amended second plea was filed, and plaintiff's demurrer was allowed to stand and was again sustained. Thereupon, the court heard the evidence, found the issues for plaintiff, and overruling motions for a new trial and in arrest, entered judgment for \$320.23.

The theory of defendants is that since the bond given ran to the People of the State of Illinois for the use of plaintiff, plaintiff cannot maintain an action on it; that the expenses incurred by plaintiff in the way of attorneys' fees were in fact for services performed on behalf of the garnishees, for which plaintiff was not entitled to recover; that the bond was not required by statute but was filed merely to obtain the writ as the clerk of the court, without authority, demanded it; that the return of the bailiff on the attachment in aid showed that plaintiff was a nonresident of the

But defendant was insured. The plaintiff further stated that the bond was demanded by the clerk of the judicial court and that defendant signed it to obtain the attachment in aid, although it was not required by the statute, and that there was therefore no consideration.

Plaintiff filed a demurrer to the second plea, which was sustained, whereupon defendant filed a second amended plea, which averred that there was no consideration for the bond, and that it was not required by the statute; that plaintiff was a non-resident of the state and had no property in the state liable to be attached and that the attachment was in aid issued upon the filing of the affidavit with the clerk of the judicial court on June 24th was

availed for the return of persons named only as garnishees. An amended affidavit of merits was also filed. Plaintiff demurred to the amended plea and again the demurrer was sustained. Thereafter,

defendant made a motion to vacate this order which was denied on October 3, 1925. Defendant's second plea was filed, and plaintiff's demurrer was allowed to stand and was again sustained. Thereafter, the court heard the evidence, found the issues for plaintiff, and overruled motions for a new trial and in arrest, entered judgment for \$250.00.

The theory of defendant is that since the bond given for the release of the state of Illinois for the use of plaintiff, plaintiff cannot maintain an action on it; that the expenses incurred by plaintiff in the way of attorney's fees were in fact for services rendered on behalf of the garnishees, for which plaintiff was not entitled to recovery; that the bond was not required by statute but was filed merely to obtain the writ on the writ of the court, with no authority, demanded it; that the return of the plaintiff on the attachment in aid showed that plaintiff was a resident of the

state and its place of residence in New Haven and also showed that it was served only upon William Sherman Hay and Meyer Morton as garnishees; and that therefore there was no liability on the bond under the provisions of section 31 of the Attachment act as amended.

Section 31 of the act on Attachments (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 11, sec. 31, p. 173) provides in substance that a plaintiff in any action of assumpsit, debt, covenant, trespass, or trespass on the case, having commenced an action by summons or capias, may, at any time, pending the suit and before judgment therein, upon filing in the office of the clerk where such action is pending, a sufficient bond and affidavit showing his right to an attachment under the first section of the act, sue out an attachment against the lands, goods, chattels, rights, moneys, credits and effects of defendant, which said attachment shall be entitled in the suit pending and be in aid thereof; that the proceedings shall thereupon be had as required or permitted in original attachments as near as may be.

As amended by an act approved June 24, 1929, Laws of 1929, p. 169, this section further provides:

"However, no bond shall be required when the defendant is a non-resident of this State and has no property in this State liable to be attached; but the attachment writ in aid in such case for the summoning of persons named as garnishees shall be issued upon the filing of the affidavit with the clerk."

It appears from the record that Cooney and Korshak on March 23, 1928, brought suit against the Missouri, Kansas, Texas Railroad Co. for \$568.75; that an affidavit for attachment in aid was filed in that cause June 24, 1930; that in the affidavit plaintiff was named co-defendant; that the affidavit avers that the New York, New Haven & Hartford Railroad Co. is a nonresident of the state; that its place of residence is New Haven, Connecticut, "and that affiant (Cooney) makes the affidavit for the purpose of procuring

that Atlanta (County) makes the affidavit for the purpose of procuring
 stated that its place of residence is New Haven, Connecticut, and
 York, New Haven & Hartford Railroad Co. is a corporation of the
 still we named so-called names; that the affidavit averred that the
 was filed in that cause June 24, 1920; that in the affidavit plain-
 railroad Co. for \$500,000; that an affidavit for attachment in aid
 taken 23, 1920, because said suit against the Missouri, Kansas, Texas
 is taken from the record that County and Houston on
 "link of the affidavit with the clerk."
 summoning of persons named as defendants shall be issued upon the
 to be returned; but the attachment is in aid in such case for the
 non-payment of this case and has no priority in this State for the
 However, no bond shall be required when the defendant is
 4. 1259, this section further provides:
 as amended by an act approved June 24, 1920, Laws of 1920,
 be.

an attachment against the property of the New York, New Haven & Hartford Railroad Company in aid of the suit at law pending in said court;" that on that date a writ of attachment in aid issued to the bailiff against the New York, etc. railroad company. It directed that such persons as might be requested by plaintiff should be summoned to appear as garnishees June 30, 1930. The bailiff returned the writ - "No property of the defendant found in the City of Chicago on which to levy the writ, and by order of plaintiff's attorney, I have served the writ on William Sherman May as garnishee, and on Meyer Morton as garnishee by delivering copies thereof to them, and at the same time informing them of the contents thereof, on June 24, 1930, at 12:05 p. m." It seems that this suit was dismissed for want of prosecution October 3, 1929, with judgment for costs but that plaintiffs in that suit (defendants here) on June 9, 1930, procured an order vacating this judgment. Defendant therein appealed to the Appellate court where the order vacating the judgment was reversed. See Cooney and Korahak v. Missouri, Kansas, Texas R. R. Co. et al., 263 Ill. App. 657. Upon the filing of the mandate from the Appellate court in the Municipal court, an order was entered vacating all previous orders and dismissing the suit. This suit upon the bond given in that proceeding followed.

Defendants here argue that the summons on the attachment in aid was for the purpose only of "summoning of persons named as garnishees;" that no bond therefore should have been required, and that since no bond was necessary or required, it was without consideration and a nullity and will not support an action. They say that the clerk of the court had no right to demand a bond, and that the filing of a bond that was not required by statute could not be made the basis of a valid obligation.

It is true that the summons issued in the attachment in

[illegible]

aid shows service only upon plaintiff railroad company and upon persons named as garnishees, but there is nothing in the affidavit or the record tending to show that defendants requested a writ thus limited. Upon the affidavit as submitted to the clerk of the Municipal court, we hold it was the duty of the clerk of that court under the statute to require a bond unless facts were set up in the affidavit showing specifically that plaintiffs there (defendants here) had brought themselves within the exemption. The fact that the bailiff found no property upon which he might levy does not change the situation in that regard, the affidavit which defendants submitted being of such character that the duty under the statute was cast upon the clerk of the court to require a bond before issuing the writ. We hold the bond was therefore not invalid, and it is unnecessary to discuss the further question raised by plaintiff in this case to the effect that whether the bond was required or not it was under the circumstances binding as a common law obligation.

In the next place, defendants contend that plaintiff can not recover because while the bond was given in the name of the People of the State of Illinois for the use of plaintiff, plaintiff here sues in his own name. Defendants cite to this point Ufflemann v. St. Louis Iron M. Co., 194 Ill. App. 42; Thompson v. Black, 200 Ill. 465; Samuelson v. Chamber of Commerce, 305 Ill. 569. This contention was not made in the trial court, and it is, we think, too late to raise it here.

Moreover, section 4 of the Attachments act (Smith-Hurd's Ill. Rev. Stats. 1933, chap. 11, sec. 4, p. 169) provides, in substance, that before granting an attachment the clerk shall take bond and sufficient security, conditioned for satisfying all costs that may be awarded to defendant "or to any others interested in said proceedings." We construed this section of the statute in Omaha

aid there is a rule only upon plaintiff's affidavit and upon persons named as witnesses, but there is nothing in the affidavit or the record tending to show that defendant's testimony is false. Upon the affidavit as admitted on the oath of the United States court, we hold it was the duty of the clerk of that court under the statute to require a bond unless there was no such affidavit showing specifically that plaintiff there (defendant here) had procured themselves within the exemption. The fact that the plaintiff found no property upon which he might levy does not change the situation in that regard, the affidavit which defendant admitted being of such character that the levy under the statute was cast upon the clerk of the court to require a bond before taking the writ. We hold the bond was therefore not in- valid, and it is unnecessary to discuss the further question raised by plaintiff in his case as to the effect that whether the bond as required or not it was under the circumstances binding as a common law obligation.

in the next place, but it was contended that plaintiff
has not recovered. But now while the Court was given in the name of the
people of the State of Illinois for the use of plaintiff, plaintiff
was given in his own name. Defendant also to claim joint Bill
11. 403; Thompson v. Thompson, 202 Ill. 327. This
contention was not made in the trial court, and it is, we think,
too late to raise it now.

My no interest or influence "or to any others interested in said
and confidential security, committed to satisfying all such
interest, that before granting an attachment and clerk shall take bond
\$10,000.00, cash, \$5,000.00 p. day) provided, in sub-
However, section 4 of the amendments act (Mich-Hurd's

Nat'l Bank v. U. S. Fidelity & Guaranty Co., 244 Ill. App. 204, and following the construction adopted by this court in McKinstry v. Bras, 180 Ill. App. 648, held in substance that the statute entered into and became a part of the attachment bond, and that it was the intention of the legislature to provide that a recovery might be had for damages sustained, not only by the defendant debtor but also by any person interested in the proceeding who might have been damaged by the wrongful suing out of the writ.

Defendants also contend that the proof as to damages shows that a part of the services performed by the attorneys for defendant was in fact performed for the garnishees in the proceeding by attachment in aid. It is therefore urged that plaintiff can not recover for the damages sustained by the garnishees. From an additional abstract filed, we think it is apparent that the services of the attorneys in that proceeding were performed at the request of the New York, New Haven & Hartford Railroad Co., and that it has become liable for such services. The garnishees, of course, had no real interest in the case. They were only stakeholders. We think the proof sufficient.

The abstract furnished by defendants is quite inadequate and has imposed unnecessary labor upon the court.

The judgment of the trial court is affirmed.

AFFIRMED.

McSurely and O'Connor, JJ., concur.

37169

LAMSON & GOODNOW MANUFACTURING
COMPANY, a corporation,
Appellee,

v.

L. P. LARSON, JR. COMPANY,
a corporation,
Appellant.

69 17
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

273 I.A. 620²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action for damages for refusal to receive and pay for goods as ordered, there was a finding for plaintiff of \$2046.27, on which the court entered judgment, which defendant asks us to reverse.

The declaration averred in substance that September 14, 1927, defendant ordered from plaintiff 10,000 sets of cutlery at the agreed price of one dollar a set; that pursuant to instructions from defendant, plaintiff delivered 6,733 sets and held up shipments of the remaining 3,267 sets, which were ready for shipment in November, 1927; that after many demands by plaintiff, defendant refused to accept the balance; that March 3, 1931, plaintiff notified defendant in writing to accept the same in thirty days or plaintiff would sell the goods in the open market for the highest price obtainable and hold defendant for the difference; that defendant again refused to accept, and that April 21, 1931, plaintiff sold the same for 41 cents a set, thereby sustaining damages of \$1927.53.

The affidavit of merits admitted the execution of the order on September 14, 1927, but averred that plaintiff refused to deliver the sets as rapidly as required; that this delay

2185

LARSON & GOODMAN MANUFACTURING
COMPANY, a corporation,
Appellee,

v.

L. P. LARSON, JR. COMPANY,
a corporation,
Appellant.

COURT, COOK COUNTY.
APPEAL FROM CIRCUIT

273 I.A. 62

MR. PRESIDING JUDGE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action for damages for refusal to receive and
pay for goods so ordered, there was a finding for plaintiff of
\$2046.27, on which the court entered judgment, which defendant
asks us to reverse.

The declaration averred in substance that September 14,
1927, defendant ordered from plaintiff 10,000 sets of entirely as
the agreed price of one dollar a set; that pursuant to instructions
from defendant, plaintiff delivered 6,738 sets and held up ship-
ments of the remaining 3,262 sets, which were ready for shipment
in November, 1927; that after many demands by plaintiff, defendant
refused to accept the balance; that March 3, 1931, plaintiff noti-
fied defendant in writing to accept the same in thirty days or
plaintiff would sell the goods in the open market for the highest
price obtainable and hold defendant for the difference; that
defendant again refused to accept, and that April 21, 1931, plain-
tiff sold the same for 41 cents a set, thereby sustaining damages
of \$1927.53.

The affidavit of merits admitted the execution of the
order on September 14, 1927, but averred that plaintiff refused

interfered with defendant's sale and distribution of the sets, and that by reason of the delay defendant was able to use only 6,733 sets; that plaintiff declined to accept further orders at a dollar a set and notified defendant that in the future the price would be \$1.10 a set.

The court heard the evidence and found for plaintiff as already stated.

Defendant contends that under the uncontradicted evidence plaintiff was not entitled to recover for the reason, as it claims, that plaintiff failed to perform the contract within the time agreed and was therefore not entitled to recover. Defendant cites Bond v. Duntley Mfg. Co., 195 Ill. App. 576; Thom Express & Storage Co. v. Kemper Bros. Co., 159 Ill. App. 85, and Bracewell v. Self, 109 Ill. App. 140, which, in substance, hold that in order to recover upon a contract plaintiff must establish by a preponderance of the evidence his compliance with the terms of the contract.

Plaintiff is a manufacturer of cutlery at Shelburne Falls, Massachusetts; defendant, a manufacturer and distributor of gum at Chicago, Illinois. September 14, 1927, defendant gave to plaintiff an order in writing No. 1681, which is partly in printing and partly in writing. The printed portion is a form used by defendant, and the written part of the order is in the handwriting of defendant's manager, who affixed his signature to the order. It reads, as follows:

"L. P. Larson Jr. Company.
711 W. Lake St.

Date 9-14-27

Lamson & Goodnow Mfg. Co.
Shelburne Falls, Mass.

Please ship us promptly the following. Subject to conditions printed. Mark each package with this address and above order number.

10,000--8 piece cutlery sets @ \$1 each as per sample

submitted (Set No. 1) each to be individually packed freight prepaid.

To be shipped out as rapidly as possible until such time as we might advise you to hold shipments for further instructions.

Conditions:

1--Do not deliver any goods without written order.

2--Acknowledge receipt of order, stating probable date of shipment.

3--Mail at once upon shipment of this order or any part of it invoice bearing above order number.

4--We do not pay for boxing or crating.

By Wm. B. Welch, V. Pres."

The order was written out at defendant's place of business in Chicago and was handed to Mr. Chappee, western sales representative of plaintiff, September 14, 1927, in Chicago. The evidence indicates that the order was forwarded to plaintiff's place of business and a formal blank acceptance mailed. The first shipment under this order was made by plaintiff October 27th thereafter. This was not the first transaction between these parties. A prior order for 5,000 sets of the same kind of goods had been given on August 17, 1927, and these were in process of being manufactured and shipped at the time the order of September 14th was executed.

The correspondence between the parties, which is in evidence, indicates that defendant at this time was anxious to have a speedy delivery of the goods. There is evidence tending to show that at the time the order of September 14th was given, defendant desired the delivery of 1,000 sets a week but that plaintiff informed defendant that it would be unable to deliver more than 600 to 700 sets a week. Defendant does not contend that plaintiff should have begun to ship under order No. 1681 at an earlier date than October 27th, and defendant's manager, who testified, says that from October 27, 1927, until the date when defendant gave plaintiff an order to

...the

• Total Available: 140013 - 100000 = 40013

2011-12-15

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1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is to collect data. This is done by the investigator who is responsible for the study. The next step is to analyze the data. This is done by the investigator who is responsible for the study. The next step is to interpret the data. This is done by the investigator who is responsible for the study. The next step is to report the results. This is done by the investigator who is responsible for the study.

... differences between the parties, which is a vital-

100-10678-100

Agency collection of the goods. There is evidence according to show

about as the group of defendants given, defendants

Estimated the delivery of 1,000 more a week but not definitely informed

It is noted that it would be desirable to deliver more than 600 to 700

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7/11/44, and 7/12/44, who said that they had been in the area of the ...

hold up shipments, the number of sets delivered were in excess of 700 sets a week. Defendant argues that plaintiff did not deliver the amount contemplated of 600 sets a week but reaches this result by including in the time upon which his computation is based the period from September 14, 1927, up to October 27, 1927, when the first shipment under order No. 1681 was made. As a matter of fact, the shipments made from September 14th to October 27th were made under the prior order given on August 17, 1927. The manager of defendant admitted that from October 27, 1927 (when the first shipment under the order sued on was made) up to November 5, 1927, (when defendant requested that there should be a cessation of shipments) plaintiff shipped goods in excess of the quota. Therefore, it appears that plaintiff did as a matter of fact fully comply with all the terms of its agreement. Moreover, even if it were assumed that it did not deliver the quota within that time the uncontradicted evidence shows that defendant accepted these shipments as made and at no time undertook to rescind the contract because of any alleged delay and thereby waived any right it might have had to rescind the contract as to the balance. Maffei v. Ginocchio, 299 Ill. 254; American E. & G. Co. v. Chicago G. Co., 184 Ill. App. 509; Carterville Mining Co. v. Eldridge, 199 Ill. App. 534.

It further appears from the evidence that the notice for an increase of price to \$1.10 a set was given in view of a further order contemplated by the parties for the following year, and that this therefore had nothing to do with order No. 1681, upon which this suit is based.

The defense therefore that plaintiff cannot recover because of lack of proof of its own compliance with the terms of the contract cannot be sustained.

At the close of plaintiff's case, defendant moved for leave

held up at all, the matter of delivery was in essence of
two days a week. Defendant signed that plaintiff did not deliver
the amount contracted for and that a good deal of money was lost
by including in the bill what was not delivered. In 1937, when the
period from January 1, 1937, up to December 31, 1937, when the
first shipment was made, the bill was paid. In a matter of fact,
the shipment was made from January 1, 1937, to December 31, 1937, and
under the prior order from January 1, 1937, the manager of
defendant ordered that from January 1, 1937, to December 31, 1937, (when
sent under the order from January 1, 1937, to December 31, 1937, when
defendant reported that there should be a cessation of shipment)
plaintiff shipped goods in excess of the quantity. However, it
appears that plaintiff did not deliver the goods which were ordered
the terms of the contract. However, even if it were assumed that
it did not deliver the goods which were ordered, the matter is
evidence shows that defendant's complaint shows defendant as not and
as no time was made as to when the contract was made or any alleged
delay and thereby failed to show that there was any delay in
contract as is now alleged. Wells v. Wells, 100 Ill. 2d 121.

Wells v. Wells, 100 Ill. 2d 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

to file a plea of offset. The motion was denied and this ruling of the court is assigned as error. The substance of the plea is that plaintiff was indebted to defendant to the amount of \$1,143.45 for profit on 3,267 sets of cutlery, which it was alleged plaintiff agreed to and failed to deliver to defendant within the time it agreed to and should have delivered the same; that the sets theretofore sold in combination with certain number of boxes of chewing gum manufactured and sold by defendant netted a profit to defendant of 35% a box; that defendant was compelled to and did withdraw the combination offer by reason of the failure of plaintiff to deliver these sets, thereby preventing the combination offer, in which defendant would have netted 35% on each combination set disposed of.

The motion was not supported by an affidavit. The record shows that this suit was begun December 21, 1931; that the trial took place seventeen months thereafter; that the motion was made after plaintiff's evidence had been closed; that neither by affidavit nor otherwise was the delay excused.

The right to file a plea of offset was not absolute at that stage of the proceedings as it rested in the sound discretion of the court. No circumstances appeared such as existed in Carlson v. Johnson, 263 Ill. 536, upon which defendant relies. Defendant cites Cook v. Baker, 137 Ill. App. 401, and Minard v. Lawler, 26 Ill. 302, both of which were cases originating before a justice of the peace and which for that reason are inapplicable. Hardy v. Dobler, 248 Ill. App. 361, and Willard v. Bristol, 251 Ill. App. 234, are conclusive against defendant's contention. In the instant case, as in the last named case cited, witnesses from a distance were in attendance upon the trial. The court did not abuse its discretion in denying defendant's motion for leave to file this plea.

A further contention is made that the finding and judgment

are against the manifest weight of the evidence. On this point defendant calls our attention to letters written by it to plaintiff on October 12th, October 15th and October 28th urging the speedy shipment by plaintiff of more of these sets. As a matter of fact these letters were with reference to prior orders, not the one upon which this suit is based. As already stated, by acceptance of the shipments when the same arrived defendant waived any right (assuming such right existed) to rescind the contract for that reason. We have examined the exhibits and read the extended correspondence between the parties and are not able to say that the finding is against the evidence but, on the contrary, are convinced that the finding of the trial court is correct.

As we find no reversible error in the record the judgment is affirmed.

ATTORNEYS.

McGuire and O'Connor, JJ., concur.

There is no doubt that the Government is doing its best to protect the public interest, but it is also true that the Government is not doing enough to protect the public interest. The Government should do more to protect the public interest, and it should do so in a way that is consistent with the principles of the Constitution.

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36803

WILLIAM S. KUHN, Jr.,
Appellee,

vs.

WILLIAM VAN DOREN WRIGHT et al.,
Appellants.

70 #
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

273 I.A. 620³

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for false imprisonment and malicious prosecution growing out of an attempt by the defendants to identify the plaintiff as the writer of certain extortion letters. The action was brought against Marion Wright, her father, William Van Doren Wright, Alexander Jamie, Edgar Dudley and Ferdinand Watzek; a jury found Marion Wright not guilty and the other defendants guilty and assessed plaintiff's damages in the sum of \$30,000; plaintiff dismissed as to the defendant Watzek. Upon suggestion by the court plaintiff entered a remittitur of \$10,000 and judgment was entered against defendants William Wright, Jamie and Dudley for \$20,000.

There is no serious disagreement as to the law to be applied in such an action. Before plaintiff can recover he must prove malice on the part of the person starting the prosecution and a want of probable cause for believing that the accused is guilty of the offense charged. An acquittal or dismissal of the charge against the accused is not proof of want of probable cause. Malice may be inferred from want of probable cause although it is not a necessary legal presumption. If the information acquired by a person starting the prosecution would induce a reasonably cautious person to entertain an honest belief that the accused was guilty, probable cause is established. Glenn v. Lawrence, 280 Ill. 591; Angele v. Paul, 85 Ill. 106. Even if the prosecution was instituted through malice, if probable cause existed a malicious prosecution

1. The first part of the document is a list of names and titles, including "The Hon. Mr. Justice" and "The Hon. Mr. Justice".

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action
tion/cannot be maintained. There must be a concurrence of two facts - malice and want of probable cause. McElroy v. Catholic Press Co., 254 Ill. 290. Respective counsel seem to agree that this is a "fact" case, defendants asserting that the proof failed to show either malice or want of probable cause, while plaintiff contends to the contrary.

In 1930 defendant William Wright resided with his wife and daughter Marion in Chicago; he was a man of business prominence and apparently of wealth; November 22, 1930, Marion, then eighteen years of age, was about to make her debut, and on that date received a typewritten letter signed in typewriting "Lester McKay," demanding \$25,000 and threatening to kill her and her father unless the money was paid; the letter directed that the money be sent in a package addressed to Lester McKay in care of General Delivery, Chicago; that if the demand was acceded to she was to advertise in the personal column of the Chicago Tribune, saying, "McKay - everything done as per instruction." Four other letters making similar threats were received by Marion at intervals within the next few days. In one of the letters the writer stated he would send an unknown person for this package of money, and that any move to trace him would mean the death of someone in the Wright household; in the last letter the writer said it would be necessary "to make an example of this household, particularly your father," and, "Remember the police have no use for a dead body, so take my advice and do as stated above." All the letters contained threats against the life of Mr. Wright.

The writing and sending of such letters is a felony. The sending and the receipt of the letters are undisputed.

Mr. Wright and his family were frightened upon receiving these letters, and he provided a police escort for his wife and daughter and armed himself.

Wright, a business man with no experience in the detection

of criminals, was naturally desirous of ascertaining the identity of the writer with the view of ending such letters or of punishing the person responsible for them. Upon inquiring of a business friend, Mr. Ranney, vice-president of the International Harvester company, he obtained a letter of introduction from him to defendant Alexander Jamie, who was a director of an organization calling itself the Committee for Prevention and Punishment of Crime of the Chicago Association of Commerce. The Committee was organized by the Association of Commerce of Chicago and its purpose was to assist the police in the investigation and detection of criminals to prevent crime in Chicago. The public press, in referring to this committee, used the name "Secret Six" for the reason that the men who backed the organization did not desire their names made public. No charges were made by this organization for the services rendered.

Wright submitted the first extortion letter to Jamie with the request that, if possible, the writer be identified. Jamie was busy on another matter and turned this investigation over to the defendant Edgar Dudley, an employee of the committee who was experienced in making investigations. Dudley had a notice inserted in the Chicago Tribune, reading "McKay - everything done as per instruction. M. W." This was in compliance with the demand made by letter. A decoy package was prepared and placed in the General Delivery department of the post office and two police officers of Chicago, Lieutenant Carr and Sergeant Knowles, and Johnstone, an investigator for the committee, watched the post office for the person who would call for the package; they saw a man come into the post office acting suspiciously, as Johnstone said; Knowles and Johnstone endeavored to apprehend the man but he escaped in the crowd.

In the meantime Dudley had questioned Miss Wright as to the young men with whom she had kept company. At this time the Wright

family had no clue or suspicion as to the writer of the letters. Miss Wright told of the plaintiff and of her experience with him; she described his conduct, which tended to his discredit; that on one occasion when accompanying her he became drunk and on the way home acted like a "crazy" man. With this information Dudley began an investigation of plaintiff's habits and was told by proprietors of certain "speakeasies" that plaintiff had been barred from those places; that he was a "queer actor" and acted irrationally. Dudley then called at the hotel where plaintiff lived and was informed he had left for Pittsburgh, although he had told Miss Wright he was going to California. Dudley also inquired at the offices of Winthrop, Mitchell & Co., where plaintiff had formerly been employed, and ascertained that plaintiff had been in those offices on the nights immediately preceding the dates of two of the extortion letters. Dudley learned that Kuhn had been discharged from this employment on account of drunkenness. Samples of writing on the typewriters in the office of plaintiff's employer were taken for the purpose of comparing such samples with the extortion letters. There is dispute in the testimony as to the report on this comparison. Garber, the cashier in the office, testified that he pointed out certain differences between certain letters in the samples taken and the same letters in the extortion writings. Dudley and Jamie denied this testimony of Garber's. On the same day Dudley and Jamie talked to a brother of plaintiff, Wendell Kuhn, who was also employed in this office, and told him of the investigation they were making; Wendell Kuhn then called the plaintiff on long distance telephone at Boston and Dudley talked to plaintiff on the telephone; he denied any knowledge of the extortion letters but promised to come back to Chicago and submit to an examination at the office of the committee.

The sample of typewriting, together with the extortion

letters, was submitted to Ferdinand Watzek, a defendant, who had formerly been an Inspector of Detectives at Vienna, and was then Assistant Director of the Scientific Crime Detection Laboratory maintained by Northwestern University. Watzek advised Dudley that in his opinion the extortion letters and the sample submitted, written on the typewriter of plaintiff's employer, had been written on the same typewriter; Watzek also made a written report to the same effect. Plaintiff's brother was informed of this. Watzek testified by deposition in the trial of this case and it is apparent he was not qualified as a typewriting expert.

Plaintiff returned to Chicago on the evening of December 7th and the next morning accompanied by his brother Wendell went voluntarily to the office of Jamie where he waited until Dudley should arrive. While he was waiting there Johnstone, who had been stationed at the post office, entered the office and saw plaintiff in the waiting room; Johnstone says he recognized plaintiff as the same person he had seen acting suspiciously at the post office; he told this to Eoken, Jamie's assistant, and to Lieutenant Carr, who were in Jamie's office at the time. Johnstone was then told to look closely to make sure that plaintiff was the same man he had seen at the post office. When Dudley arrived Johnstone told him that plaintiff was the same person he had seen at the post office. Dudley and police officers Carr and Knowles then questioned plaintiff very severely. Dudley says that in reply to his question as to when plaintiff was last in the post office, plaintiff replied, "I have never been in the WickerPark post office." Three of the extortion letters were mailed from this post office. Plaintiff denies that he made this reply. Dudley then requested plaintiff to submit himself to what is called the "lie detector" test under the supervision of Dr. John A. Lareen, an Assistant State Criminologist and a competent man experienced in the use of the test.

This lie detector is an apparatus which registers by tracings respiratory, blood pressure and cardiac variations; the test is painless and involves no physical discomfort. Dudley, Carr and Knowles were present when the test was made. Dr. Larson first explained to plaintiff the character of the questions that would be put to him, which would include the question whether or not he had mailed the extortion letters; he also told plaintiff that the test might convict him and that it was hoped to get information which would either clear the plaintiff or tell whether he had guilty knowledge or had himself been involved in the case. Plaintiff submitted to the test. There was a normal reaction to the general questions propounded. When plaintiff was asked whether he had any guilty knowledge of the extortion letters and whether he wrote them he answered both questions in the negative, but the recorded reactions were registered as abnormal. At the completion of the test Dr. Larson advised Dudley that in his opinion the results indicated either that plaintiff was guilty or had guilty knowledge. Dr. Larson said plaintiff stated that he had just come from a sanitarium in Massachusetts where he had been treated for alcoholism, and that plaintiff inquired whether, under such circumstances, his nervous condition would explain the record of the lie detector. Dudley, Carr and Knowles corroborate this, but plaintiff denies he made this statement, but testified that he said, "I have been having a third degree all morning and am pretty tired."

Plaintiff's counsel argues that the investigators should have known that the indicator on the detector would vary because of the trying experience they had subjected him to and because his nerves were raw from such experience.

Dudley, Carr and Knowles then returned with plaintiff to the offices of the committee, where Mr. Frederick Burnham, plaintiff's attorney, with plaintiff's brother, awaited them; they were

This is a very important question, and one which has been discussed in many different ways. The first thing to be considered is the nature of the question itself. It is a question of fact, and not of law. It is a question of what actually happened, and not of what should have happened. The second thing to be considered is the evidence which is available. This evidence is of two kinds: direct evidence and circumstantial evidence. Direct evidence is evidence which is based on the testimony of a witness who saw the event happen. Circumstantial evidence is evidence which is based on facts which are inferred from the evidence. The third thing to be considered is the weight which should be given to the evidence. This weight is determined by the reliability of the witness, the consistency of the evidence, and the probability of the event having happened. The fourth thing to be considered is the conclusion which should be drawn from the evidence. This conclusion is based on the facts which have been established, and on the weight which has been given to the evidence. The fifth thing to be considered is the application of the law to the facts. This application is based on the principles of law which have been established, and on the facts which have been established. The sixth thing to be considered is the final decision which should be reached. This decision is based on all of the things which have been considered, and on the principles of law which have been established.

told that Dr. Larson had given his opinion that the lie detector test indicated that plaintiff was guilty. Burnham then with great zeal argued with Dudley to the effect that there were manifest differences in the sample of typewriting upon which Watzek had reported and the writing in the extortion letters. Burnham then asked what they intended to do and Lieutenant Carr replied that he was going to place plaintiff under arrest, and in answer to the question as to who had directed him to do this, Carr replied, "On my own, I am doing this on my own accord." Carr says he based his belief of plaintiff's guilt upon the facts he had acquired during the investigation. It was then agreed that plaintiff should be taken to a hotel. Wright was not present either at the arrest or at any of the above occurrences. Plaintiff's brother Wendell testified that before the arrest was made Dudley said, "If Wright says to go ahead we will go ahead;" that he and Carr then went in another room and closed the door and when they emerged announced they were going ahead. Carr testified positively that he did not consult Wright before making the arrest. Knowles testified that Wright's name was not mentioned. Wright testified that he was not told that an arrest was about to be made, although later on he was asked whether he and his daughter would appear in court and testify. Dudley testified that he did not telephone to Wright before the arrest was made but that afterward he called Wright to determine whether he and his daughter would be witnesses. Marion Wright was in St. Louis when the arrest was made.

After the arrest plaintiff was placed in a room at the St. Clair hotel. A man named Gordon was placed in the same room; he was an investigator for the committee and is characterized by plaintiff's counsel as a "steal pigeon." Gordon and plaintiff played cards together and conversed freely. Gordon says plaintiff told him he had made two mistakes - that he had used an old typewriter, and

that when questioned about the General post office he had answered he had never been in the Wicker Park post office.

The following morning plaintiff was taken to the offices of the committee, where he was held pending the procuring of bail. In the afternoon plaintiff was taken to the Detective bureau for booking, but about six o'clock p. m. was released on bail.

On the same day, December 9th, Sergeant Knowles had prepared and signed a complaint charging plaintiff with writing the extortion letters; December 10th the complaint was called for hearing before Judge Lyle, then in the Felony court branch of the Municipal court; Judge Lyle refused to accept Sergeant Knowles as the complaining witness and demanded that Miss Wright sign the complaint. Marion Wright had returned from St. Louis and she and her father, with Dudley, called at the office of the State's Attorney and talked with Assistant State's Attorney C. Wayland Brooks. Dudley says he related to Mr. Brooks all the material facts. Plaintiff argues here that important facts were omitted and some of the facts misrepresented. Gordon was present and related to Mr. Brooks what plaintiff had said to him while they were together in the St. Clair hotel. Brooks testified that he got the impression from Gordon's statement that plaintiff had confessed guilt.

Wright and his daughter objected to signing the complaint; Mr. Brooks reported this to his senior in the State's Attorney's office, a Mr. Holman, and repeated what he had learned; Mr. Holman told him to advise Marion to sign the complaint and that she and her father, acting upon the advice of an Assistant State's Attorney, would be immune from any suit for damages; Mr. Brooks also reported the facts to Judge Lyle and asked his advice; Judge Lyle demanded that Miss Wright sign the complaint. The name of Sergeant Knowles was then stricken from the complaint and Miss Wright signed her

There was a small group of people who were not in the room when the door was closed. They were standing outside the door and looking in. They were not allowed to enter the room.

The following material was obtained from the Division of Investigation, Bureau of the Federal Bureau of Investigation, United States Department of Justice, Washington, D. C., on August 1, 1961.

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the committee's findings are consistent with the findings of the other two committees. The committee's findings are consistent with the findings of the other two committees.

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1. The first part of the document is a letter from the author to the editor of the journal, dated 1964. The letter discusses the author's interest in the topic of the journal and the author's intention to submit a paper to the journal.

1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The majority of the population of the United States is now living in urban areas, and this is a result of the process of urbanization, which has been going on since the beginning of the 20th century.

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THE HOUSE OF LORDS

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name. Wright said that he was reluctant to appear in the matter; that all he wanted to do was to stop the letters from being written. The case was continued from time to time, and on January 21, 1931, it was helle pressed on motion of the State's Attorney.

We have sketched briefly the salient facts in the case which, we are told, took three weeks to try.

The first question which presents itself is whether there was any evidence to submit to the jury tending to show that William Wright was guilty of malice in any of the things he did. The question must be answered in the negative. Wright was naturally alarmed by the threatening character of the letters received by his daughter, alarmed not only for himself but for the members of his family; upon the advice of a friend he submitted the letters to the defendant Jamie for investigation; after that he did no more than receive occasional reports as to the progress of the investigation; he did not undertake to control it and took no affirmative steps in the matter. His role was not so much that of a prosecutor of plaintiff as a protector of his family, and to mulct him in damages for that is unconscionable. The law will not permit the presumption that there was malice when all the evidence shows the contrary. Kanneman v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 248 Ill. App. 196.

Plaintiff's counsel argues that Wright can be held under the doctrine of respondent superior, upon the assumption that Jamie and Dudley and the police officers were his agents. Wright was not the principal of these persons; he did not hire them or pay anything for their services; he had no control of them, and of course had no authority to discharge any of them. Jamie and Dudley were employees of the Chicago Association of Commerce, a corporation not for profit. They were accountable only to this Association. After Wright placed the letters in their hands he could not have prevented them from continuing the investigation. As we have noted, the "committee" was

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organized for the purpose of assisting the police in the investigation of crimes of extortion and the like.

Manifestly, none of the police officers were the agents of Wright. They were employed by the City of Chicago and were responsible to it alone. It is well settled that the relation of principal and agent must actually exist before one can be held liable for the torts of an agent.

It might be noted in this connection that Wright, when he brought the letters to Jamie, asked that the authorship might be determined so that the letters might be stopped. Police officer Carr testified that he made the arrest on his own responsibility and without the knowledge of Wright. And when, at the insistence of Judge Lyle, Marion Wright signed the complaint, Wright objected, saying all he wanted was to stop the writing and sending of these letters.

Plaintiff asserts that Wright can be held upon the theory that he was in a conspiracy with the other defendants and that any one of the conspirators is liable for the acts of the others. It is sufficient to say that there is no basis for the charge of conspiracy. To prove a criminal conspiracy it must be shown that the parties charged sought to accomplish an illegal purpose or to consummate a legal object by unlawful means. It cannot be seriously contended that when Wright sought to ascertain the authorship of the extortion letters he was engaged in a criminal conspiracy.

A judgment against several defendants in a tort action is a unit. South Side El. R. R. Co. v. Heavig, 214 Ill. 463. As the judgment against Wright must be reversed it must also be reversed as to the other defendants.

But there is another reason why the judgment against Jamie and Dudley cannot stand. Certain facts were presented to them pointing to plaintiff as the author of the letters. Among these were his

irregular habits; the report of a man whom they believed to be an expert that the extortion letters were apparently written upon a typewriter to which plaintiff had access; the identification by Johnstone of the plaintiff as the man seen acting suspiciously in the general post office, apparently there in response to the advertisement in the Chicago Tribune; the report that the lie detector test indicated guilt and the report of Gordon of statements by plaintiff equivalent to a confession. All of these things, if unquestioned, showed probable cause for believing that plaintiff had sent the letters. On the other hand, much of the testimony supporting these alleged facts was seriously weakened by the questioning and analysis of a very able and experienced attorney. Should Jamis and Budley have ignored the evidence which tended to prove the guilt of plaintiff, and in its stead accept the results of attorney Burnham's demonstration of its weakness? Budley remarked at the time that as between the report of the typewriting expert (whom he had been told was an expert) and the opinion of the attorney for the plaintiff, he preferred to accept the opinion of the expert.

Where the facts relied upon as showing probable cause are controverted, it is for the jury to determine what the facts are, and the court may instruct them to what amounts in law to probable cause. Schattgen v. Molnback, 149 Ill. 646; Angelo v. Paul, 85 Ill. 106. Malice is generally a question of fact for the jury. Luthmers v. Hazel, 212 Ill. App. 199. It does not require as much evidence to prove the existence of probable cause as is required to obtain a criminal conviction. Anderson v. Friend, 85 Ill. 135; Hecht v. Oesterreicher, 219 Ill. App. 639.

Can it be said that the verdict of the jury finding that the prosecution was without probable cause and inspired by malice was justified?

Having in mind the evidence presented to the minds of

Jamie and Dudley tending to identify plaintiff as the writer of the extortion letters, as well as the evidence to the contrary, we hold that the finding of the jury in both respects was contrary to the manifest weight of the evidence. Plaintiff must prove in such a case as this that there was both malice and want of probable cause. It does not necessarily follow that if one makes an honest and reasonable mistake in judgment as to the strength of the evidence against a suspect, that there is want of probable cause.

We have not commented upon the statement to Assistant State's Attorney Brooks, upon which he advised that prosecution be commenced. It was a question for the jury to determine whether he was told all the facts, and plaintiff's counsel point out a number of things which it is claimed were omitted in the statement to Mr. Brooks.

We are inclined to think that the jury went astray upon this trial because of the obvious fact that the case was tried as if the issue were the guilt or innocence of plaintiff with reference to sending the letters. Evidence tending to show probable cause was treated as if offered to prove the guilt of plaintiff. The jury evidently was influenced by the vulnerability of this evidence when attacked by able counsel for plaintiff, and ignored its credibility as it appeared when first presented to Jamie and Dudley and the police officers.

There is much argument in the respective briefs over alleged errors upon the trial and with reference to instructions. Comment upon these would too much extend this opinion. If there is another trial they will hardly occur again.

As applicable to this case we quote from Acas v. Snider, 69 Ill. 376:

"A party ought not to be held guilty when he sets in motion a criminal prosecution, simply because he fails to convict the person accused, or indeed in every case where he fails to show the party was guilty.

While the jury seemed to readily believe in the truth of the
 evidence, as well as the wisdom of the verdict, we felt
 that the finding of the jury in this respect was entirely in the
 interest of the defendant. The evidence, however, was not
 clear on this point, and the jury was not in a position to
 if they had been able to see the evidence in its entirety.
 reasonable mistake in judgment as to the strength of the evidence
 against a verdict, and hence the finding of the jury.

The jury was not permitted to see the evidence in its entirety.
 State's Attorney Brown, upon whom the finding of the jury was
 based. It was a question of the law, and the jury was not
 he was told all the facts, and the jury's finding was
 number of things which it is evident were stated in the evidence
 to the jury.

The jury was not permitted to see the evidence in its entirety.
 trial because of the evidence that was presented to the jury.
 from what was said or implied in the evidence, and the jury
 seeing the facts. The jury was not permitted to see the evidence
 stated as it related to the facts of the case. The jury
 witness was introduced to the jury, and the jury was not
 allowed to see the evidence in its entirety, and the jury was
 as it appeared when the evidence was presented to the jury, and the
 before the jury.

There is much argument in the evidence which is not
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The jury was not permitted to see the evidence in its entirety.
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 of the evidence which was presented to the jury, and the jury was

The policy of the law is rather to encourage the prosecution of criminals alleged to be guilty of grave offenses; but if the prosecuting witness is to be mulcted in damages for an honest error in judgment, few prudent men would run the hazard of instituting a criminal prosecution."

And even more pertinent is the language of Mr. Chief Justice Breese in Collins v. Hayte, 50 Ill. 383:

"Our experience teaches us there are few questions of law more difficult of comprehension by a jury, than those which govern trials for malicious prosecutions. It seems difficult for them to appreciate, if the plaintiff was really innocent of the charge for which he was prosecuted, that he still ought not to recover. They do not readily comprehend why an innocent man may be prosecuted for a supposed crime or offense, and yet have no recourse against the prosecutor who caused his arrest and imprisonment, and yet the preservation of the peace and the good order of society require, that even innocent men may be compelled to submit to great inconvenience and hardship, rather than citizens should be deterred from instituting prosecutions where there is reasonable or probable grounds to believe in the existence of guilt."

At the close of the evidence defendants' counsel moved the court to direct the jury to find the defendant William Wright not guilty, which was denied. This peremptory instruction should have been given.

The judgment against William Van Doren Wright is therefore reversed, and as there was no evidence tending to support the charge against him the cause will not be remanded as to him. The judgment as to Jamie and Rudley is reversed and the cause as to them is remanded.

REVERSED IN PART WITH FINDING OF FACT.
REVERSED AND REMANDED IN PART.

Hatchett, P. J. and O'Connor, J., concur.

(See next page.)

We find that there is no evidence proving or tending to prove any of the charges in the declaration against the defendant William Van Boren Wright.

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It is the duty of the State to protect the rights of its citizens and to maintain the peace and order of the State. The State is the guardian of the public interest and the welfare of the people. It is the duty of the State to protect the rights of its citizens and to maintain the peace and order of the State. The State is the guardian of the public interest and the welfare of the people.

PEOPLE OF THE STATE OF ILLINOIS
 ex rel. GERTRUDE CUMMINGS,
 Appellee,

vs.

EMMETT SHERIDAN, President of the Cook
 County Board of Commissioners, et al.,
 Appellants.

APPEAL FROM CIRCUIT COURT
 OF COOK COUNTY.

273 I.A. 620⁹

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is a mandamus proceeding in which the writ was awarded, ordering the defendants to pay the relator \$1741 as salary due her. The defendants appeal.

The relator alleges in her petition that she was employed in the classified service of Cook county as a nurse and was forced to obtain leave of absence on account of illness; upon her recovery she asked to be restored to her position but the Civil Service Commission refused to reinstate her; she thereupon instituted an action of mandamus to compel her reinstatement and on June 27, 1932, she was awarded the writ, and was restored to duty on July 21, 1932. The present petition is to compel the defendants to issue a warrant for her salary for the time she was off duty, that is, from April 2, 1931, to the date she was restored to duty, July 21, 1932.

Defendants filed a second amended answer in which they asserted that the salary appropriated for the relator's position was, during the time she was prevented from performing her duties, paid by the County in good faith to a de facto incumbent of her position. The relator questions the sufficiency of the answer in this respect. The answer alleges:

"* that for and during the entire period from April 2, 1931, to and including July 21, 1932, the duties of the said position of attending nurse I. W. were performed by an incumbent de facto of said position, and that all moneys appropriated or provided by the Board of Commissioners of Cook County for attending nurses I. W. for the period of time in question have been paid by Cook County in good faith to the incumbent de facto, and deny that there was any surplus in the respective appropriation accounts for attending nurses I. W., but state that each position for attending nurse

I. W. for which an appropriation was made was filled and the salary paid to each incumbent respectively."

This was a sufficient averment that the salary relator seeks had been paid to a de facto incumbent. It is well established that such a payment is a complete defense to such an action. O'Connor v. City of Chicago, 327 Ill. 526; Mittell v. City of Chicago, 327 Ill. 443; People ex rel. Durante v. Burdett, 283 Ill. 124; People ex rel. Sartison v. Schmidt, 281 Ill. 211; McMahon v. County of Cook, 210 Ill. App. 196.

Relator argues that the answer does not deny the allegation of the petition that there was a surplus in the appropriations for services, and that there are ample and sufficient funds in the accounts from which relator's salary may be paid and that said amounts are still available for this purpose. The petition sets forth the Cook county appropriation bill for the Nursing Service Division of "27 - Oak Forest Institutions." The appropriations are made for each particular class of nurses; they are itemized and not in a lump sum. The appropriation for "Attending Nurses, I. W." (Irresponsible Ward) are distinct and separate amounts from appropriations for other classes of nurses. Defendants' answer denies that there is any surplus amount in the account "for Attending Nurses, I. W." and asserts that each position for an Attending Nurse I. W. for which an appropriation had been made was filled "and the salary paid to each incumbent respectively." There may be a surplus in some of the amounts appropriated for other classes of service, but this is not important, as a surplus in other accounts is not available for the payment of the "Attending Nurses I.W." who can lawfully be paid only out of the specific appropriations for their salaries. Relator's demurrer admits this.

People ex rel. McDonnell v. Thompson, 316 Ill. 12, cited by the relator, restates the rule that payment of the salary of an officer to a de facto officer constitutes a bar to an action by the

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1. The first group of people who are not in the labor force are those who are not in the labor force because they are not in the labor force.

(continued)

de jure officer for the salary, but states that an exception obtains "Where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead." There are no facts in the instant case bringing it within this exception. The petition shows that the relator was absent from service on account of physical disability, during which time she received disability payments from the Cook County Employees Annuity and Benefit Fund. She was, therefore, not illegally removed from office and there is no showing that the incumbent was illegally appointed in her stead.

Relator says that, in any event, she is entitled to compensation for the period between June 27, 1932, the date of the judgment order reinstating her, and July 21, 1932, when she was restored to duty. Under the authority of People ex rel. McDonnell v. Thompson, supra, relator was entitled to be paid her salary for this period. Defendants argue against this because the petition does not show that relator was ready, willing and able to discharge the duties of her position. It is sufficient to say that the relator by her petition was demanding payment for a period up to and including July 21st, and the answer asserts no defense to the claim for payment for the period between June 27th and July 21st.

We hold that the demurrer to defendants' second amended answer should have been overruled. The judgment awarding the writ is therefore reversed and the cause is remanded for further proceedings consistent with what we have said in this opinion.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

is this officer for the office, but it is not clear from the record whether the officer is actually employed by the office and the salary has been paid to another person. It is also noted in his record that there are no facts in the record which show that it is within this category. The position which was the subject was vacant from 1915 until 1916 at which time it was filled by the same person who was previously mentioned. The record also shows that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past.

Register was made in the year 1915, and it is noted in the record for the period between June 17, 1915, and July 13, 1915, that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past. It is also noted in the record that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past. It is also noted in the record that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past.

We wish that the document in question be removed from the file and that the person who was previously mentioned be removed from the file. It is also noted in the record that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past. It is also noted in the record that the person who was previously mentioned was the one who was appointed to the position and that there is no record of any other person who was appointed to the position in the past.

Witness my hand and seal this 1st day of January, 1916.

37008

NATIONAL BOND & INVESTMENT COMPANY,
a Corporation,

Defendant in Error,

vs.

FRANK TAFEL, Jr.,

Plaintiff in Error.

727
ERROR TO MUNICIPAL COURT
OF CHICAGO.

273 I.A. 621¹

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Defendant asks for the reversal of a judgment against him and that the capias ad satisfaciendum be quashed.

A summons was duly issued out of the municipal court which was duly served upon defendant, commanding him to appear and defend a suit in trover. Plaintiff's statement of claim alleged that the defendant had unlawfully, wilfully and maliciously converted and disposed of an automobile to his own use with the intent to defraud and cheat the plaintiff, and had maliciously failed and refused to deliver the automobile to plaintiff; also, with similar allegations he was charged with converting another automobile belonging to plaintiff; damages were alleged at \$1074.68. When the case was called for trial defendant failed to appear and default was entered against him for want of his appearance; the court thereupon heard evidence and assessed plaintiff's damages at \$1074.68.

This judgment was based on an action in tort and plaintiff was entitled to the issuance of a capias ad satisfaciendum on the judgment. Chap. 77, sec. 5, Cahill's Illinois Statutes. People v. Walker, 236 Ill. 541; Field & Co. v. Freed, 269 Ill. 558; Levy v. Schikowaki, 239 Ill. App. 447; Fatz v. People, 239 Ill. App. 250.

Defendant argues that plaintiff was not entitled to a capias because the judgment order did not recite that defendant maliciously converted the property. The default of the defendant admitted the charges of wilful and malicious conversion of the property of

plaintiff. A default admits every material and traversable statement of facts in the statement of claim, and it is unnecessary to state in the judgment order any of the preceding facts or the nature of the action, whether ex delicto or ex contractu. Freeman on Judgments, 1925 Edition, vol. 1, par. 71; Meyer v. Ross, 119 Ill. App. 485; Leven v. General Contract Purchase Corp., No. 36328, opinion filed in this court February 21, 1935; Chap. 37, Para. 425, Cahill's Illinois Statutes, 1931.

Moreover, the question of whether or not malice is the gist of the action becomes material only when the judgment debtor has been taken into custody under a writ of Cu. Sa., and makes application under the Insolvent Debtor's Act for his discharge in the County court. It was expressly so decided in Reinwald v. McGregor, 239 Ill. App. 240. See also, People v. Walker, *supra*; In re Paer, 264 Ill. App. 372; Levy v. Schikowski, *supra*, 447.

In Reinwald v. McGregor, *supra*, and People v. Walker, *supra*, it was also held that there was no necessity for applying to the court for an order to issue the writ, but that a plaintiff, having recovered a judgment in tort, is entitled to have the writ upon request to the clerk of the court.

Counsel for defendant is in error in stating that it is the practice in the courts to have damages assessed by a jury, because a defaulted defendant being absent does not waive his right to a jury trial in tort cases. It was decided to the contrary in Favlich v. Gladich, 311 Ill. 149.

As the record before us does not contain the evidence heard upon the trial, we will presume that it was sufficient to support the finding and judgment. Keen v. Leibold, 211 Ill. App. 163; Miller v. Glass, 113 Ill. 143.

For the reasons indicated the judgment of the Municipal court is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

57035

RUSNAK BROTHERS, INC., a Corporation,
Appellant,

vs.

H. A. MacTAVISH and MRS. H. A.
MacTAVISH, his Wife,
Appellees.

73
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 621²

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

In an action of replevin the bailiff took from the defendants certain household furniture and delivered the same to the plaintiff; the cause was tried by a jury, finding the right of property in the defendants and judgment was accordingly entered, from which plaintiff appeals.

Plaintiff bases its claim of right to take the property upon two conditional sale contracts, one dated August 29, 1929, and alleged to be signed by defendant H. A. MacTavish, the other dated December 9, 1929, alleged to be signed by the co-defendant, Mrs. H. A. MacTavish; these contracts recite the sale by plaintiff to defendants of the furniture taken under the writ, with the right to recover the property if the monthly installments on the purchase price were not paid as stated. Plaintiff offered evidence tending to show that the defendants, respectively, signed these documents.

Both defendants categorically denied that they had signed these documents or that the signatures thereon were their signatures; they admit that there is still due a balance of approximately \$200 on the furniture. Defendants say that while they never signed these contracts they did sign, jointly, a chattel mortgage. To support this defendants introduced in evidence an account book given them by plaintiff at the time of the transaction. Inside the cover of this book is the following:

"Notice.

The following goods are secured by Chattel Mortgage. All persons removing goods mortgaged to Rusnak Bros. without permission from

HUMAN RIGHTS, 1991, a Convention,
Appellate,

vs.

H. A. RACIAVIN and Mrs. H. A.
RACIAVIN, his wife,
Appellants.

IS 5 A. A. 621

MR. JUSTICE MURRAY KENNEDY AND MR. JUSTICE

In an action of trespass the plaintiff sought from the de-
fendants certain personal property and delivery of the same to
the plaintiff; the cause was tried by a jury, finding the right of
property in the defendants and judgment was accordingly entered,
from which plaintiff appeals.

Plaintiff bases his claim of right to said property
upon two affidavits also submitted, one dated August 21, 1962,
and alleged to be signed by defendant H. A. Racavin, the other
dated December 9, 1962, alleged to be signed by the defendant,
Mrs. H. A. Racavin; these documents recite the sale by plaintiff
to defendants of the personal property under the will, the right
to recover the property in the estate, inheritance and the proceeds
thereof were not sold or gifted. Plaintiff offered evidence tending
to show that the defendants, respectively, signed these documents,
both defendants categorically denied that they had signed
these documents or that the signatures therein were their signa-

tures; they admit that there is still an estate of approximately
\$200 on the testament. Defendants say that while they never signed
these documents they did sign, jointly, a letter to plaintiff. In con-
fessing this defendant introduced in evidence an account book given
them by plaintiff on the day of the transaction. In this book were
of this book is the following:

Witness

The following books are owned by Charles Racavin. All persons
removing books without his consent are liable to prosecution.

the office, will be prosecuted to the full extent of the law and such mortgage will be foreclosed at once.

Kuesak Brothers."

Mr. MacTavish also testified that some time thereafter he was asked by Mr. Jolink, credit manager of plaintiff, to call at its office and he was there asked to sign "a new chattel mortgage." The reason given was that the company had changed from a partnership into a corporation. Jolink did not testify, so there was no denial of this conversation.

Plaintiff complains that the trial court did not permit it to explain how the account book describing the goods as secured by chattel mortgage was given to defendants at the time. The record does not show any proper question on this point. A witness for plaintiff was asked whether he could "explain that book showing here chattel mortgage." The witness was allowed to testify that he saw one of plaintiff's employees hand the book to defendants, and attempted a partial explanation. There was no offer to explain why the book characterized the transaction as a chattel mortgage, although in plaintiff's brief the attorney states that he could have shown that this particular type of book was given to defendants by mistake. Even if such evidence had been introduced it would hardly have impressed the jury, for the book shows some twenty-six payments entered by plaintiff at different times and each of these times plaintiff must have seen that the book was a "chattel mortgage" book. Plaintiff sought in rebuttal to prove by an alleged handwriting expert the genuineness of the signatures on the conditional sale contracts.

The jury had the opportunity of observing the witnesses and must have been impressed by the positive statements of the defendants that they had not signed these contracts. It would be difficult for a reviewing court to say that the verdict was manifestly against the greater weight of the evidence, although sitting as

the office, will be given to the full extent of the law and such mortgage will be foreclosed at once.
HAROLD ROBINSON.

Mr. Robinson then testified that he is a resident of New York City and was called by Mr. Tolson, writing under the name of "Mr. Tolson", to call at the office and he was there asked to sign a new mortgage mortgage. The reason given was that the mortgage had been changed from a mortgage-ship into a corporation. Tolson did not testify, as stated, as he denied of this conversation.

Plaintiff testified that he called upon Mr. Tolson in New York City to explain how the account book containing the books as shown by Charles Mortenson was given to Tolson. He testified that the account book does not show any proper relation on this point. A witness for plaintiff was asked whether or not Tolson had been looking at the account book. The witness was asked to testify that he saw one of plaintiff's employees who had been to Tolson's office and attempted a partial explanation. There was no other testimony, any the book characterized the transaction as a partial mortgage, although in plaintiff's order the account book was shown to him. He has shown that this particular type of book has been introduced in suits by himself. Even if such evidence had been introduced it would hardly have impressed the jury, for the fact alone does twenty-six pages as shown by Tolson in all other cases and each of these cases plaintiff would have been told that the book was a "partial mortgage" book. Plaintiff testified in testimony to have by an alleged handwriting expert the handwriting of the witness turns on the conditional sale contract.

The jury had the opportunity of observing the witness and must have been impressed by the positive statements of the witness and that they had not signed such contracts. It would be difficult for a reviewer to say that the verdict was manifestly against the greater weight of the evidence, although stating as

jurors we might have been of a contrary opinion.

The record, however, shows another matter which is conclusive upon this court. The jury returned a special verdict finding that the conditional sale contracts were not signed by the defendants. No mention of the special findings was made upon the motion for a new trial. No motion was made to set them aside and they are not mentioned in the assignments of error in this court. It has been repeatedly held that under such circumstances this court is conclusively bound by such special finding of fact. Blake v. Kishkerat, 344 Ill. 508, and cases cited in that opinion.

Sweeney v. Northwestern Mutual Life Ins. Co., 251 Ill. App. 1.

The only question involved was whether defendants signed the sale contracts, and as the special findings of fact establish that they did not, the judgment of the trial court must of necessity be affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

includes a time to read even in the new world

The record, however, shows another matter which is con-
sistent upon this point. The jury returned a special verdict finding
that the conditional sale agreement was not shown by the evi-
dence. No mention of the special findings was made upon the motion
for a new trial. The motion was made to set aside the verdict and
not mentioned in the assignment of error in this court. It has
been repeatedly held that under such circumstances this court is
conclusively bound by such special findings of fact. *People v.*
Leopoldt, 244 Ill. 104, 96 Cal. 404, 100 Cal. 404.

the only question is, what was the purpose of the trip?

[illegible]

37038

CORNELIUS MARKS,

Appellee,

vs.

JONES TRANSFER COMPANY, a Corporation,
Appellant.

74
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 621³

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover compensation for injuries received while a passenger in an automobile which was struck in the rear by a following truck owned and operated by defendant. Upon trial she had a verdict for \$2500, for which judgment was entered. The defendant appeals.

It is argued that plaintiff failed to prove that she was in the exercise of ordinary care for her own safety, and that defendant was not guilty of any negligence causing the accident.

About nine o'clock in the evening of November 10, 1932, plaintiff was in a party going by automobile from Chicago to Aurora, Illinois, to attend a meeting of a ladies' club; they were going westward on route 18, a State highway, in three automobiles running tandem; plaintiff was on the back seat of the third or last automobile (we shall hereafter designate this as plaintiff's car.) It was a dark night, chilly, with snow flurries, but the pavement was dry.

Route 18 at the place of the accident is a four lane drive about 40 feet in width. Defendant's truck was a large one with six wheels, heavy, and loaded, going westward. About a mile or a mile and a half east of where the accident occurred plaintiff's automobile, at a speed of from forty to forty-five miles an hour, had passed defendant's truck going west.

As the automobile next ahead of plaintiff's approached the village of Lisle its left front wheel became hot and began to throw off sparks and smoke; its driver brought it to a stop on the

right hand or north traffic lane next to the outer curb; plaintiff's car approached this standing car and either slowed down or stopped. Although there is some argument to the contrary, the evidence conclusively shows that the tail light on plaintiff's car was not burning and had not been burning for some time. At this instant, at this point, two automobiles were travelling eastward with bright lights; defendant's driver had dimmed his headlights as he passed these eastbound automobiles; he first saw plaintiff's car when he was about twenty-five feet from it; at this time he was going from twenty to twenty-five miles an hour; he put on the brakes and averted to the left, but his right front wheel and corner hit the left rear corner of plaintiff's car; the impact broke the spindle bolt of the truck which released the brakes and it then made a circle in the highway to the left, around the second automobile, pushing plaintiff's car; then both plaintiff's car and the truck turned to the right and both ran off the road into a field on the north side of the road. On each side of the highway was an earth shoulder nine feet in width on a level with the paved highway. The accident happened in the country; the only building in the vicinity was a gas station on the south side of the highway. Plaintiff was taken to the office of a doctor in Naperville, who dressed the bruises on her legs; the party then proceeded with plaintiff to Aurora where the club meeting was held; they remained there until eleven-thirty or twelve o'clock p. m., when plaintiff returned to Chicago in another automobile.

Whether or not plaintiff, under the circumstances, was in the exercise of ordinary care for her own safety just before the accident was a question to be determined by the jury. She was riding as a guest in the rear seat of the automobile, and it would be difficult to say what she could have done that would have prevented the collision.

Before the plaintiff can recover she must prove by the greater weight of the evidence that defendant was guilty of the negligence charged. Glender v. Johnson, 358 Ill. App. 69. We hold that plaintiff did not successfully meet this requirement. Plaintiff's automobile was without a tail light and had stopped or slowed up on the highway immediately in front of defendant's truck; no warning was given defendant of its presence; its dark color, together with the brightness of the passing automobiles, made it difficult for one approaching from the rear to see it for any great distance ahead. As soon as the truck driver saw the automobile in front of him, when about twenty-five feet away, he did all that could be expected to avoid hitting it.

Plaintiff argues that defendant's driver should have seen that the second automobile, in front of plaintiff's, was on fire. There is no evidence that this automobile was on fire; the brake band on the left front wheel had become heated and was throwing off sparks and a great amount of smoke. Several of plaintiff's witnesses testified that there was no flame. Furthermore, the occupants of that automobile were standing about the heated wheel, thus hiding the sparks and smoke from view of the truck driver.

The statute required plaintiff's car to have a lighted red tail light. Chap. 95a, sec. 16 (a) (Cahill) 1931. The statute also prohibits the driver of a vehicle stopping on a state highway except in case of emergency. Chap. 121, para. 161 (2), (Cahill) 1931. Defendant had the right to assume that the drivers of other vehicles on the highway would obey these requirements. Hiddle v. Manager, 254 Ill. App. 68; Mulligan v. Andel, 245 Ill. App. 132.

Under somewhat similar circumstances the owner of a following automobile which bumped into one in front has recovered damages from the owner of the front automobile. Barnstable v. Calandre, 270 Ill. App. 57; Moyer v. Vaughan's Seed Store, 242 Ill. App. 308. We hold

that the verdict finding defendant guilty of negligence is manifestly against the greater weight of the evidence.

Also, certain errors upon the trial require a reversal and remandment. Plaintiff failed to prove any causal connection between the disabilities of which she complains and the injuries received in the accident. This was called to the attention of plaintiff's counsel who promised to make the connection but failed to do so. The burden of proof is on the plaintiff to establish a causal connection between the alleged injury and the disability claimed. Sanitary District v. Industrial Commission, 343 Ill. 238. Motions were made to strike out the testimony of plaintiff's physician as to certain disabilities which he found upon his examination, on the ground that this causal connection had not been proven. These motions to strike should have been allowed.

The proper form of an interrogatory to a physician as to the permanency of a plaintiff's condition is to inquire whether he has an opinion, based upon a reasonable degree of certainty.

Complaint is made of the instructions given at the request of plaintiff. Instruction No. 1, which is rather lengthy, told the jury they could include as damages such sums as were expended for doctor bills and medicine, without limiting those expenses to those necessarily incurred nor as to the reasonable value of the medical services. There is no evidence in the record as to how much plaintiff expended for medicine. The instruction also told the jury they could estimate damages, based upon the value of plaintiff's time during the period she was disabled. The record contains no evidence as to the value of her time. The same criticism could be made of the instruction as to plaintiff's "powers to earn money." There is no evidence as to this. The instruction also improperly told the jury that it could "reward" the plaintiff. Damages are for compensation for injuries received and not a reward.

Plaintiff's given instruction No. 2 was manifestly erroneous. As submitted it was in two paragraphs. The first one is as follows:

"The jury are instructed, as a matter of law, that the plaintiff and the driver of the automobile in which she was riding, had a perfect right, while in the exercise of ordinary care for their own safety, to the use and travel upon the highway where the accident happened."

The second paragraph reads:

"If you believe that the highway was divided into lanes, and that the automobile in which plaintiff was so riding was in the outer lane and there was sufficient space for defendant's truck to pass on the inner lane and its failure to do so was the proximate cause of the collision which resulted in the injury complained of, then plaintiff has made out her case against the defendant and you should so find."

The trial court, evidently recognizing the impropriety of the second paragraph, drew a narrow line from the upper left hand of the paragraph to the lower right hand side; when they retired the jury took with them the instruction in this condition. The entire paragraph could be easily read by the jury. The first paragraph is a mere abstract statement calculated to mislead the jury. Garvey v. Chicago Ry. Co., 536 Ill. 276. The proper method of striking out the second paragraph of the instruction was either to have the instruction rewritten or the part stricken out completely obliterated so that the jury could not read it. Pepple v. Lacey, 339 Ill. 480; W. E. Conkey Co. v. Bucherer, 84 Ill. App. 633.

Plaintiff's given instruction No. 3 can be criticized as instructing the jury to find from the "weight" of the evidence instead of the greater weight, and to take into consideration "pain and suffering" endured without reference to the injury sustained. Also, it limits the exercise of reasonable care on the part of plaintiff to the time of receiving the injuries instead of the time of, and immediately prior to, the collision. Williams v. Stearns, 256 Ill. App. 425.

"I don't know whether it was in the car or not. As admitted it was in the car."

Follows:

"The jury are instructed, as a matter of fact, that the automobile in which the defendant is alleged to have been driving at the time of the collision with the car of the plaintiff was made out for sale and was not for sale at the time of the collision."

The second paragraph reads:

"If you believe that the highest and best use of the land is the use of the land as a parking lot for automobiles, then the defendant is liable for the collision with the car of the plaintiff. If you believe that the highest and best use of the land is the use of the land as a parking lot for automobiles, then the defendant is liable for the collision with the car of the plaintiff. If you believe that the highest and best use of the land is the use of the land as a parking lot for automobiles, then the defendant is liable for the collision with the car of the plaintiff."

The third paragraph, which is the first of the instructions of

the second paragraph, reads as follows: "The defendant is liable for the collision with the car of the plaintiff."

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the jury find with them the instruction is not correct. The

entire paragraph could be easily read by the jury. The first

paragraph is a very short paragraph and is not correct. The

jury. James M. Smith, Jr., the first of the instructions of the

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Lesson, Nov. 11, 1911.

Plaintiff's given instruction No. 4 is unintelligible. Instructions should be so clear and plain as to be readily understood by a jury. Vocke v. City of Chicago, 208 Ill. 192.

Plaintiff's given instruction No. 5 is also confusing. It instructed a verdict for plaintiff if the jury believed "that a reasonable person in the position of the driver at the time of such negligent act could have foreseen." It is not what a driver "could" have foreseen, but what he would have foreseen in the exercise of ordinary care. The negligent act must be such as an ordinarily prudent person ought to have foreseen might occur as the result of the negligence. Illinois Central Railroad Co. v. Oswald, 338 Ill. 276; Seith v. Commonwealth Electric Co., 241 Ill. 252. In Ford v. Mine Bros. Co., 237 Ill. 463, the giving of a similar instruction was held to be not reversible error, although it was criticized.

For the reasons above indicated, the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

Matchett, P. J., and O'Connor, J., concur.

Plaintiff's given instruction No. 1 is inadmissible.
Instructions should be so given and given to be clearly under-
stood by a jury. People v. Jones, 100 Cal. 100.
Plaintiff's given instruction No. 2 is also inadmissible. It
introduced a verdict for plaintiff in the fact called for a
reasonable person in the position of the driver at the time of the
negligent act could have known. It is not what a driver should
have known, but what in fact he knew. It is inadmissible.
Instructions should be given in such a way as to be clearly
understood by a jury. People v. Jones, 100 Cal. 100.
Plaintiff's given instruction No. 3 is also inadmissible. It
introduced a verdict for plaintiff in the fact called for a
reasonable person in the position of the driver at the time of the
negligent act could have known. It is not what a driver should
have known, but what in fact he knew. It is inadmissible.
Instructions should be given in such a way as to be clearly
understood by a jury. People v. Jones, 100 Cal. 100.
Plaintiff's given instruction No. 4 is also inadmissible. It
introduced a verdict for plaintiff in the fact called for a
reasonable person in the position of the driver at the time of the
negligent act could have known. It is not what a driver should
have known, but what in fact he knew. It is inadmissible.
Instructions should be given in such a way as to be clearly
understood by a jury. People v. Jones, 100 Cal. 100.

The last sentence above introduced, the foregoing is repeated
and the same verdict for plaintiff is given.
Verdict for plaintiff.

Witness, J. J., and J. J., sworn.

37047

VIRGINIA THOMPSON, a Minor, by
her Next Friend, JAMES THOMPSON,
Appellee,

vs.

JOSEPH GUARANGUANO and JEFFERSON
ICE COMPANY, a Corporation,
Appellants.

On Appeal of JEFFERSON ICE COMPANY,
a Corporation,
Appellant.

75 17
APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 621

MR. JUSTICE McSURNELY DELIVERED THE OPINION OF THE COURT.

On the afternoon of June 30, 1931, plaintiff, then eleven years old, while upon the premises of the Jefferson Ice Company was struck and injured by a truck operated by Joseph Guaranguano; she brought suit to recover damages and upon trial the jury found Guaranguano not guilty and defendant Jefferson Ice Company guilty and assessed the damages at \$7500. Defendant Ice company appeals from the judgment on the verdict.

Defendant operated a station for the distribution of ice to its customers on the south side of Wabansia avenue in Chicago; there was an enclosure opening north onto Wabansia about fifty-four feet long from east to west and thirty-five feet from north to south; the south part was a loading platform ten feet wide, leaving a space of about twenty-five feet for trucks and customers; the enclosure had a cement floor running out to the sidewalk and was roofed over; at the east end of the platform was an office, reached by several steps leading up from the sidewalk; large pieces of ice were brought onto the platform by means of a cog chain which pulled them out to the ice cutter which was about the center of the platform, where the pieces were cut up into the required sizes by the ice cutter. It was the custom for trucks to back into this enclosure up to the platform to receive ice. The evidence also tends

37047

VIRGINIA TRADING, a firm, of
not best friend, JAMES TRADING,
Appellee.

10.

JAMES TRADING, a corporation,
Appellee.

ON APPEAL OF JAMES TRADING,
a corporation,
Appellee.

MR. JUSTICE BRADLEY DELIVERED THE OPINION OF THE COURT.

On the afternoon of June 20, 1901, a party, James
years old, while upon the premises of the defendant, the company,
was struck and injured by a horse owned by James Truitt,
the plaintiff, who brought suit to recover damages and costs. The facts
Guaranteed not to fail, and the plaintiff, James Truitt, who
and assessed the damages at \$100. Defendant, the company, appeals
from the judgment on the verdict.

Defendant offered a stipulation that the distribution of the
to its owners on the north side of the main road, 1/2 mile
there was an enclosure opening north into the main road, 1/2 mile
feet long from east to west and 100 feet from north to
south; the north part was a leading pasture 100 feet wide, facing
a space of about twenty-five feet for timber and pasture; the
enclosure had a second line running out to the sidewalk and was
ruled over; at the east end of the enclosure was an alley, running
by several steps leading up from the sidewalk; in the place of the
were brought onto the sidewalk by means of a long chain which pulled
them out to the lot center which was about the center of the lot.
Then, where the steps were and on into the pasture since by the
ice cutter. It was the custom for trucks to pass into this en-
closure up to the sidewalk to receive ice. The witness also took

to show that defendant customarily sold ice to children all along this platform, from the ice cutter to the east end, the children standing on the floor level with the trucks. It was shown that many children came with little wagons which they would back up against the platform, and leaving them there would go up the stairs to the office at the east end and buy tickets, return to the platform and exchange the tickets for ice. It was while plaintiff was standing on the floor of this enclosure, somewhat to the west of the center of the platform, that she was struck by a truck and injured.

Defendant contends that it was the custom for children and pedestrian customers purchasing ice to stand within a space about ten feet wide next to the east wall of this enclosure. Plaintiff contends that there was no such space set off or assigned to the children or other customers by any railing or other mark; that defendant did not exercise ordinary care for the safety of its customers, and that no sufficient supervision was kept over the children to avoid injury from backing trucks.

On the day of the accident, in the afternoon, plaintiff came from the east on Wabansia avenue toward defendant's station; she had fifteen cents with which to buy ice, and also a little wagon in which to haul it; she was accompanied by a brother and a sister, five and six years of age, respectively; she was on the north side of Wabansia and saw that a large truck with trailer attached was maneuvering to back into the enclosure. The truck was twenty-five feet in length and the trailer twenty feet; the truck and trailer approached from the west on Wabansia and pulled east past the enclosure, and backed in from the east; thus they were in a position to obstruct plaintiff's approach to the enclosure on the east side. She testified that "the trailer was backing in right down there at the ticket office."

She went with her small wagon toward the center of the

to show that defendant's conduct was not in violation of the
 about this matter, from the fact that he was not one of the
 children standing on the floor level with the others. It was
 shown that many children were with little women and that
 would pick up against the plastic, and looking down there when
 go up the stairs to the office at the end of the day. It was
 return to the plastic and possibly see inside the box. It was
 while plaintiff was standing on the floor of this building,
 somewhat to the west of the corner of the plastic, that she was
 struck by a truck and injured.

Defendant contends that it was the driver of defendant's
 and pedestrian customer's car. It is shown that a space
 about ten feet wide next to the west wall of this building.
 Plaintiff contends that there was no such space and that it was
 closed to the children or other customers by any railing or other
 mark; that defendant did not exercise ordinary care for the safety
 of its customers, and that no sufficient supervision was kept over
 the children to avoid injury from parking trucks.

On the day of the accident, in the afternoon, plaintiff
 came from the east on Federal Avenue toward defendant's station;
 she had fifteen cents with which to buy ice, and also a little
 wagon in which to haul it; she was accompanied by a brother and a
 sister, five and six years of age, respectively; she was on the
 north side of Federal and was about a block from the station
 when she was answering to back into the building. The truck
 was twenty-five feet in length and the trailer twenty feet; the
 truck and trailer appeared from the west on Federal and pulled
 east past the engine, and backed in from the west; that they
 were in a position to obstruct plaintiff's approach to the en-
 closure on the west side. The position that the trailer was
 facing in that time at the street office."

platform which would be ~~that~~ opposite the cutter, and testified that she was told by someone to wait at that point; the driver of the truck and trailer called to her to get out of the way. At this time there was another truck standing next to the west wall of the enclosure; plaintiff, with her brother and sister, walked over to this truck and stood there watching the truck and trailer back in east of her; the space in which the children were standing was ten or twelve feet wide; at this time the truck driven by Guaranguano backed into this space, moving somewhat diagonally, and caught plaintiff between the southwest corner of his truck and the standing truck to the west.

The jury could properly believe that there were usually a large number of children at this station buying ice; that some had wagons and that ice was delivered to them all along the loading platform, although usually ~~at~~ at the ice cutter; that trucks and the children occupied the floor space promiscuously.

Defendant says that no ice was delivered until the customer had procured tickets at the office at the east end of the enclosure, and ~~that~~ as plaintiff had not procured her ticket, it is argued that she had not come to buy ice but had come merely to pick up pieces, and was therefore a trespasser. The jury, however, could properly believe her testimony that she never came to the plant to pick up pieces of ice but always came to buy; that she usually left her wagon at the platform, which could not easily be taken up the stairway to the office, and then she would go upstairs to the office, get her ticket, and then return to her wagon to get the ice, and that this was what she intended to do at this time. The truck and trailer, backing in, obstructed her approach to the office and she was waiting with her little brother and sister until these vehicles to the east of her came to a standstill.

Plaintiff charged that in conducting its business in this

truck to the west. Tilt between the southwest corner of his truck and the spreading packed into this space, moving somewhat diagonally, and caught again or twelve feet wide; at this time the truck driven by respondents east of her; the space in which the collision was occurring was ten this truck and stood there waiting the arrival of another truck in emergency; plainly, with her brother and sister, waited ever to time there was another truck standing next to the west wall of the the truck and trailer called to her to get out of the way. At this that she was told by someone to wait at that point; the driver of platform, which would be ~~the~~ opposite the other, and located

The jury could possibly believe that there were actually a large number of children at the station building; that some had weapons and that too were delivered to them all along the loading platform, although usually ~~there~~ ^{there} a few cars; that trucks and the children occupied the floor space predominantly.

Defendant says that no ice was delivered until the afternoon of the 11th. She says that she had no ice at the time she was in the office at the time of the shooting, and that she had no ice at the time she was in the office at the time of the shooting. She says that she had no ice at the time she was in the office at the time of the shooting, and that she had no ice at the time she was in the office at the time of the shooting.

manner defendant failed to exercise ordinary care for the safety of its customers, including children of tender years, using its premises at defendant's invitation, which, with the concurring negligence of Guaranguano in backing his truck, caused the injury to plaintiff. The jury's conclusion was that this charge was proven, and we cannot say that this is contrary to the manifest greater weight of the evidence.

Defendant argues that the negligence charged does nothing more than furnish a condition by which the injury was made possible through the subsequent independent act of the driver of the truck, citing among others the familiar case of Seith v. Commonwealth Electric Co., 241 Ill. 252. In this case a wire charged with electricity, belonging to the Commonwealth Electric company, burned off between two poles and the live wire fell to the ground; a police officer struck it with his club, knocking it against the plaintiff, burning her; the judgment for plaintiff was reversed on the ground that the Electric company could not possibly have anticipated that a policeman would throw the wire upon plaintiff with his club when the wire was lying where no injury would be done by it. In Hartnett v. Boston Store of Chicago, 265 Ill. 331, the judgment for plaintiff was reversed on the ground that the injury could not have been anticipated. In Illinois Central Railroad Co. v. Oswald, 338 Ill. 270, cited by defendant, the judgment for plaintiff was reversed on the sole ground of contributory negligence; but in that case the court stated that one of the essential elements in actionable negligence was, that the injury must be the natural and probable result of the negligent act "and be of such a character as an ordinarily prudent person ought to have foreseen might probably occur as a result of the negligence, although it is not essential that the person charged with negligence should have foreseen the precise injury which might result from his act." To support the defense that the creation of a

condition is not the proximate cause of an injury occasioned by the subsequent independent act of a third party, it must be proven that the injury could not have been reasonably anticipated as likely to result from the condition. "Proximate cause is that which naturally leads to or produces, or contributes directly to producing a result such as might be expected by a reasonable and prudent man as likely to directly and naturally follow and flow out of the performance or non-performance of any act." McClure v. Hoopston Gas Co., 303 Ill. 89. The defendant was bound to anticipate the results naturally following from its failure to exercise ordinary care for the safety of its customers, especially of children. Illinois Central R. R. Co. v. Siler, 229 Ill. 390. Among the cases that support the proposition that the test is whether the party guilty of the first act or omission might reasonably have anticipated the intervening cause as a natural and probable consequence of his own negligence, are Jenkins v. LaSalle County Coal Co., 264 Ill. 238; Ford v. Mine Bros. Co., 237 Ill. 463; Waltling v. C. R. I. & P. Ry. Co., 252 Ill. 466; Livak v. Chicago & Erie R. R. Co., 299 Ill. 218; Siegel, Cooper & Co. v. Treka, 218 Ill. 562, and many other cases.

Defendant says that when concurrent negligence of two defendants is charged and one is acquitted and the other not, there is a fatal variance, as the charge of joint negligence has not been proven. This is not the law. In Pierson v. Lyon & Healy, 243 Ill. 370, plaintiff charged the concurrent negligence of Lyon & Healy and of the City of Chicago; the City was found not guilty and Lyon & Healy guilty; the same point now urged was made in that case. The court held against this contention, saying that it was unnecessary in actions of tort against several defendants to prove a joint liability; that if the guilt of any one is proven a recovery can be had as to such defendant. In line with this are Linguist v. Hodges, 248 Ill. 491; Postal Tel. Cable Co. v. Likes, 225 Ill. 249; Pennington v. Rowley Bros. Co., 241 Ill. App. 58; Pressley v. Bloomington

& M. Ry. Co., 271 Ill. 622. The case cited by defendant, St. Louis, Belleville and Suburban Co. v. Hopkins, 100 Ill. App. 567, and 112 Ill. App. 364, in the respect under consideration is not in line with the weight of authority.

Defendant cites a number of cases holding, generally, that an invitee must use ordinary and customary means of ingress and egress, for an implied invitation will not extend beyond the necessary lines of travel. This may be conceded as a general proposition, but the jury in this case could properly find that children were invited to buy ice all along the platform and especially from that part running from the ice cutter in the center to the east end of the platform. There is no evidence that the ice was delivered from the office, or exclusively within the ten feet next to the office wall. The evidence shows that there were no limitations fixed to control or guide customers, especially children.

Whether or not plaintiff was guilty of contributory negligence was for the jury to determine, and we cannot say that their conclusion in this respect was against the weight of the evidence. Mackallunas v. C. & E. I. R. R. Co., 318 Ill., 142, and many other cases.

Defendant complains that the court improperly refused to admit certain evidence offered on its behalf. We do not find any proper offer of evidence which was refused. There was a long question and statement, covering five pages of the abstract, as to what counsel for defendant proposed to prove. There were many objectionable elements in the question, such as the alleged impossibility, economically, to maintain a private entrance to the plant, and that the service of furnishing ice at retail is not particularly sought by ice dealers; that this was done more as an accommodation to poor people living in the neighborhood, and a great many other objectionable similar matters. Where any part of evidence offered is objec-

tionable the whole must be excluded, and where any part is admissible its exclusion can not be questioned unless the offer of this particular evidence was separately made. Harmen v. Indian Grave Drainage Dist., 217 Ill. App. 502; The People v. Venard, 168 Ill. App. 254; Riemenenider v. Riemensnider, 179 Ill. App. 209; Zinger v. Sanitary District of Chicago, 175 Ill. App. 9; Donnan v. Donnan, 256 Ill. 244. We find no prejudicial error in the rulings on the evidence nor in the instructions given or refused.

The verdict was warranted by the evidence and as there were no prejudicial errors upon the trial the judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

the whole must be examined, and where any part is excluded
 the exclusion can not be questioned unless the effect of this par-
 ticular evidence was separately made. People v. ...
People v. ... 170 Ill. App. 2d; People v. ... 170 Ill.
App. 2d; People v. ... 170 Ill. App. 2d; People v. ...
v. ... 170 Ill. App. 2d; People v. ... 170 Ill. App. 2d;
 170 Ill. App. 2d. We find no prejudicial error in the ruling on the
 evidence not in the instructions given or refused.
 The verdict was warranted by the evidence and no error was
 no prejudicial error upon the trial the judgment is affirmed.
 AFFIRMED.

Metcalf, J. J., and C'Conner, J., dissent.

37056

RAYMOND F. HAYES,
Appellee.

vs.

TAYLOR WASHING MACHINE COMPANY,
a Corporation,
Appellant.

76
APPEAL FROM MUNICIPAL COURT
OF CHICAGO. 17

273 I.A. 6221

MR. JUSTICE McSURNLY DELIVERED THE OPINION OF THE COURT.

Plaintiff, bringing suit for services as an attorney rendered defendant, upon trial by the court had judgment for \$169.40, from which defendant appeals.

Defendant claims that plaintiff was employed at a monthly salary which was to cover all services. Plaintiff says the monthly salary was to cover only suits for the defendant on its accounts receivable in the Municipal court of Chicago, and on appeals from the Justice of the Peace courts, and if any other services were rendered defendant would pay a fair and reasonable fee for the same. This suit was to recover for services rendered in four different matters, plaintiff claiming that extra fees were due him for these. The trial court allowed only the last item.

To support its defense defendant introduced ⁱⁿ evidence a letter written by plaintiff acknowledging receipt of defendant's letter of employment, in which the monthly retainer was stated at \$175 for services in the Municipal court of Chicago, and when it was necessary to represent defendant in other courts plaintiff was to receive no additional compensation. Plaintiff introduced evidence showing that the terms of this letter were abandoned by agreement of the parties. Plaintiff started to work August 1, 1931, receiving \$175 a month, but by November his pay was reduced to \$100 a month; later this was increased for awhile and then decreased. The monthly payment seemed to have vacillated according to the wish of Mr. Taylor, the president of the defendant

2502

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— and a number of other persons who were not present at the time of the hearing.

24 before the trial for the purpose of determining the value of the property.

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company. Plaintiff's version, that he was to receive extra compensation for extra services rendered, is supported by the testimony of Mr. Walker, who was the credit and collection manager of the defendant. Mr. Walker hired plaintiff on the basis of \$175 a month, plaintiff to receive additional compensation for any extra work outside of his employment. Walker testified that Taylor was told of this agreement and approved of it. The court was justified in holding that plaintiff was entitled to receive compensation for extra services.

The claim for extra services allowed by the court was based upon services rendered in connection with a criminal charge against Walker. Walker says that at the direct instructions of Taylor he removed a lot of household goods from a certain place for defendant and was arrested and charged with burglary for doing this. Someone telephoned to plaintiff, asking him to handle the matter. Although there is some argument as to the identity of the person telephoning, the court was justified in believing it was Taylor, defendant's president. In response to this, plaintiff was quite active. He succeeded in having Walker and a salesman of defendant who was also arrested released on bond; he appeared in court and represented the parties upon the trial and succeeded in having the charge dismissed. An attorney testified that the reasonable fee for such services was \$350.

The court found the services worth \$300. Plaintiff had received a check for \$155.59 covering his monthly salary, which was endorsed in full payment of all services, and plaintiff had not cashed it. The court thereupon said if plaintiff would cash the check, he would give judgment for the balance of \$160.41. Apparently the check was subsequently cashed and judgment was entered for the balance.

We see no reason to disagree with the trial court, and the judgment is affirmed.

AFFIRMED.

Matchett, P. J., and O'Connor, J., concur.

37065

JOE BACIGALUPO and COMMERCIAL CREDIT
COMPANY, a Corporation,

Appellees,

vs.

MOTOR VEHICLE CASUALTY COMPANY,
Appellant.

777
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 622²

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, in an action on an insurance policy issued by the defendant, upon trial by the court had judgment for \$2000. Defendant appeals. The policy was issued to Peter Granata and Commercial Credit Company, a corporation, and the plaintiff Bacigalupe claimed as assignee of the interest of Granata in the policy.

There is no bill of exceptions in the record before us. Defendant attacks the statement of claim, alleging noncompliance with section 18 of the Practice act, which provides that an assignee of any cause in action may sue thereon in his own name, and shall in his pleading, by his affidavit, "allege that he is the actual bona fide owner thereof and set forth how and when he acquired title."

The statement of claim before us alleges that

"on, to-wit, the 20th day of October, A. D. 1932, said Peter Granata for a good, valuable and sufficient consideration assigned and transferred to the plaintiff, Joe Bacigalupe, all of his right, title and interest in and to the said policy of insurance hereinbefore more fully set forth; that the plaintiff, Joe Bacigalupe, is the actual and bona fide owner of said interest of Peter Granata."

The affidavit of claim filed herein and executed by the plaintiff, Joe Bacigalupe, states that

"he is the actual and bona fide owner of said interest of said Peter Granata; that, on, to-wit, the 20th day of October, A. D. 1932, he purchased the same for a good and valuable consideration from said Peter Granata."

Defendant first attacks the videlicet. There is no merit in this contention. Tarjan v. National Surety Co., 268 Ill. App. 232; Luka v. Behn, 225 Ill. App. 105; Bishop v. Dignan, 223 Ill.

App. 173.

Defendant next says that the statement does not show "how" plaintiff acquired title. Neither is there any merit in this contention. In the statement of claim plaintiff asserts under oath that he acquired the interest of Granata in the policy "for a good, valuable and sufficient consideration;" that the plaintiff "is the actual, bona fide owner" of this interest, and that he acquired it on October 20, A. D. 1932, when "he purchased the same for a good and valuable consideration from said Peter Granata." This was a sufficient compliance with the statute.

As there is no bill of exceptions we must presume that the proof was sufficient to justify the entering of a joint judgment in favor of the plaintiffs.

The judgment is affirmed.

AFFIRMED.

Hatchett, P. J., and O'Connor, J., concur.

36324

EMMA M. CHADWICK,
Appellee,

vs.

FEDERAL LIFE INSURANCE CO.,
a Corporation,
Appellant.

78 17
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 622³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal the defendant seeks to reverse a judgment for \$3258.71, entered on the verdict of a jury. The suit was brought by plaintiff, the beneficiary, on a policy of accident insurance issued by the defendant to Seneca J. Chadwick, plaintiff's husband. The material provision of the policy involved insured against "death, *** resulting, within sixty (60) days from the date of accident, directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means."

On February 17, 1931, while the policy was in full force and effect, the assured was injured in an automobile accident and died April 12, 1931.

Plaintiff's position is that as a result of the injuries hypostatic pneumonia developed resulting in the assured's death. The defendant contends that the assured's death did not result from the injuries, but from a streptococcic sore throat from which pneumonia developed resulting in death.

Each side offered evidence of physicians tending to sustain the respective contentions. The jury were instructed at defendant's request, that if they found from the evidence that the death of the assured "resulted from two causes, injury and disease, and you further find that the disease was not caused by the accident," then plaintiff could not recover and their verdict must be for the defendant. The jury found in favor of plaintiff and defendant contends that

WMA & CASHING,
Attorneys,

W.

GENERAL LIFE INSURANCE CO.,
a corporation,
defendant.

278 LA. 022

27. JUSTICE OF PEACE COURT FOR DISTRICT NO. 10.

By this record the following facts are shown:

On January 17, 1901, at New Orleans, Louisiana, the late Mrs. J. M. [Name] was insured against death, and the policy was issued to her by the General Life Insurance Company, a corporation, of the State of Louisiana. The policy provided that in the event of the death of the insured, the sum of \$10,000 should be paid to the estate of the insured, and the sum of \$1,000 should be paid to the estate of the insured's children. The policy was issued to the late Mrs. J. M. [Name] and the sum of \$10,000 was paid to the estate of the late Mrs. J. M. [Name] on April 12, 1901.

On January 17, 1901, the late Mrs. J. M. [Name] was insured against death, and the policy was issued to her by the General Life Insurance Company, a corporation, of the State of Louisiana. The policy provided that in the event of the death of the insured, the sum of \$10,000 should be paid to the estate of the insured, and the sum of \$1,000 should be paid to the estate of the insured's children. The policy was issued to the late Mrs. J. M. [Name] and the sum of \$10,000 was paid to the estate of the late Mrs. J. M. [Name] on April 12, 1901.

The following facts are shown in the record: The late Mrs. J. M. [Name] was insured against death, and the policy was issued to her by the General Life Insurance Company, a corporation, of the State of Louisiana. The policy provided that in the event of the death of the insured, the sum of \$10,000 should be paid to the estate of the insured, and the sum of \$1,000 should be paid to the estate of the insured's children. The policy was issued to the late Mrs. J. M. [Name] and the sum of \$10,000 was paid to the estate of the late Mrs. J. M. [Name] on April 12, 1901.

The following facts are shown in the record: The late Mrs. J. M. [Name] was insured against death, and the policy was issued to her by the General Life Insurance Company, a corporation, of the State of Louisiana. The policy provided that in the event of the death of the insured, the sum of \$10,000 should be paid to the estate of the insured, and the sum of \$1,000 should be paid to the estate of the insured's children. The policy was issued to the late Mrs. J. M. [Name] and the sum of \$10,000 was paid to the estate of the late Mrs. J. M. [Name] on April 12, 1901.

the verdict is against the manifest weight of the evidence.

There is no dispute in the evidence except the opinions given by the physicians. Plaintiff called two doctors, one the attending physician, and Dr. Wells who made a postmortem examination of the body. Defendant called three physicians who gave their opinions in answer to hypothetical questions put to them.

The evidence shows the assured was about 65 years old, in good health, and was injured in an automobile collision in Indiana on February 17, 1931. He sustained fractures of the left patella, two ribs and one finger, and numerous cuts and abrasions; he was taken to a hospital near the place of the accident where he remained for five days, was then taken home in an automobile and carried into his house, where he remained in bed until he died, April 13th, except that he was occasionally placed in a wheel chair about a week before he died. Shortly after the assured was injured his left leg was immobilized by means of a splint reaching from his hip to his foot. He complained of pain in his knee and chest. Shortly after the accident he improved; he was propped up in bed at times in order to take his meals, was able to write letters and seemed to be getting better until April 9th, when he had a chill and his temperature rose to 104 or 105; shortly thereafter the attending physician discovered hypostatic pneumonia.

Dr. Cox, the attending physician, called by plaintiff, testified among other things that he first saw the assured on March 2, 1931; that they kept an aluminum splint on his left leg from the hip to the foot for a period of about six weeks; that about a week before his death the doctor put him in a wheel chair for a short time each day; that the patient's weakness was out of proportion to his injuries; that the progress made by the patient was slow but steady; that he came down with a chill and high fever, and had a sore throat, sort of tonsillitis infection, and the next day became

the verdict is against the manifest fact of the evidence.

There is no dispute in the evidence about the evidence

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attending physician, and Dr. Cox, who made a statement

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Dr. Cox, the attending physician, and the evidence about the

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unconscious, his temperature being about 104 to 105 degrees, and shortly thereafter he died; that there was no evidence of bronchial pneumonia; that there was a filling up of the bottom of the lungs which presented a physical consolidation called edema where the fluid accumulated, and that this usually produced death or long drawn out illness. The doctor then gave as his opinion that death was due to hypostatic pneumonia; that the throat inflammation had no bearing on the hypostatic pneumonia. The doctor further testified that in his opinion the fact that a man 65 years of age lay in bed six or seven weeks as a result of an accident, would be sufficient to produce hypostatic pneumonia independently of the throat condition; that hypostatic pneumonia would not be likely to produce streptococcic sore throat.

Dr. Wells testified that he had performed about three thousand autopsies; that he made a postmortem examination of the body; that he found the fracture in the kneecap which had apparently healed; that the left 6th and 7th ribs had been broken about the middle of the lateral side but were in approximate apposition; that he found the organs as a whole in excellent condition for a man 65 years old; that "Both lungs showed large accumulations of fluid in the back of the up and down portions of a man lying in bed, while the front part of the lungs were practically normal," and that "If a person is recumbent for some time, there is a tendency for the blood to settle in the lower part of the body;" that fluid accumulates which is "a beautiful culture medium for bacteria;" that these bacteria get into the lungs and often hypostatic pneumonia develops; that this sort of pneumonia is easily distinguishable from the other sorts. The doctor then testified that in his opinion the hypostatic pneumonia was "a sequel to the injuries and the necessary recumbent position;" that "the injuries were sufficient to cause or bring about the hypostatic pneumonia."

the hypostatic aneurism was "a second or third degree of the
the other type. The aneurism was localized in the upper
valves; and this sort of aneurism is easily distinguished from
hypostatic aneurism for it is not given hypostatic aneurism the
which is "usually situated below the hypostatic;" and hypostatic
to occur in the lower part of the body; that this accumulation
pattern is peculiar for some time, there is a tendency for the blood
the front part of the lungs were gradually absorbed," and that "if
the back of the lungs were sections of a man lying in bed, with
years old; that "both lungs showed large accumulations of fluid in
he found the circumferential in the middle of the lungs for a man 60
middle of the lateral ribs and were in approximate position; that
marked; that the left side and the right side were even about the
body; that he found the tendency in the lungs when not completely
thousand aneurism; that he gave a description of the
Dr. Wells testified that he had not heard about when
produce aneurismic type of aneurism.

The defendant called three physicians, Doctors Wheeler, McNally and Moore; each, in answer to a hypothetical question gave his opinion that the injuries such as the assured received were not sufficient, independently of all other causes, to cause the death.

Dr. Wheeler testified that in his opinion, "the hypothetical person had an acute pneumonia following an infection of the throat." Dr. McNally testified that in his opinion, "the trauma suffered on February 17, 1931, was not responsible for this intensive infection and lobar pneumonia found on April 12th;" that the injuries received "were not sufficient directly and independently of all other causes" to account for the death; that "Hypostatic pneumonia may follow a prolonged disease where the patient is incapacitated for weeks or months following some great injury and it may follow a throat condition." Dr. Moore testified that in his opinion the injuries enumerated were not sufficient to cause death.

From the foregoing, we think it clear that whether the injuries, independently of all other causes, caused the assured's death, was a question ^{of fact} for the jury, and we are also of the opinion we would not be warranted in disturbing the verdict on the ground that it is manifestly against the weight of the evidence.

Complaint is made that the court erred in refusing to give an instruction requested by the defendant. The offered instruction is as follows: "You are further instructed that if in this case death has been caused by the sum of two causes, injury and disease not caused by the injury, it is sufficient to prevent a recovery on the policy if any ordinary disease, not necessarily fatal, should contribute with the injury to cause the death; that is, if without the presence of the disease the injury itself would not have been sufficient to have caused the injury or death, it is not necessary to show that the disease was such that it alone would have caused

death." We think this instruction was properly refused. It is involved and would not assist the jury in understanding the question for their consideration, but would probably tend to confuse them. Moreover, the jury was fully instructed by another instruction given at the defendant's request, to which we have above referred. We think the jury clearly understood the issue involved.

The judgment of the Circuit court of Cook county is affirmed.

AFFIRMED.

Hatchett, S. J., and McSurely, J., concur.

"Gentle," he said, "the investigation was conducted in a
 friendly and would not be a trial of the law. The
 question for their consideration, but only possibly that is an-
 other. Moreover, the fact that the investigation is being
 conducted, even if it is a trial of the law, is a good
 thing. He said the fact that the investigation is being
 conducted.

The fact that the investigation is being conducted is
 a good thing.

He said.

He said, "I am, of course, a lawyer."

36990

LUCILLE SALIBA,
Defendant in Error,

vs.

WILLIAM WEBER,
Plaintiff in Error.

79
7
ERROR TO CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 622⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this writ of error the defendant, William Weber, seeks to reverse an order entered by the Circuit court of Cook county denying his motion to quash a capias ad satisfaciendum.

The record discloses that Lucille Saliba brought an action against the defendant to recover damages for personal injuries sustained by her in an automobile collision. Plaintiff's declaration was in six counts, in some of which defendant was charged with wilful and wanton conduct in driving his automobile at the time in question. Upon defendant being served with process his appearance was entered by counsel, who suggested that defendant was fifteen years of age and moved that a guardian ad litem be appointed for him. An order was entered accordingly and pleas were filed on behalf of the defendant by his guardian ad litem. The case was tried before the court without a jury and there was a finding and judgment in plaintiff's favor for \$2,500. The court also made a special finding as follows: "The Court finds from the evidence that the defendant William Weber was driving said automobile in a wilful and wanton manner." An appeal was prayed and allowed from the judgment to this court, but apparently was not prosecuted. Afterward capias ad satisfaciendum was issued and the defendant taken into custody by the sheriff. Shortly thereafter the defendant by his counsel filed a written motion praying that the capias be quashed and that he be discharged from the custody of the sheriff. The motion set up (1) that under section 12, article 2, of our constitution, a body execution could be issued only in two cases: (1) where the debtor

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DATE 11-11-2000 BY 60322 UCBAW

MR. JUSTICE WILSON, CHIEF JUSTICE OF THE COURT.

THE COURT: This case is one of the most important in the history of the country.

It involves the rights of the people of the United States to be free from the oppression of the government.

The people of the United States are entitled to the same rights as the people of any other country.

They are entitled to the same rights as the people of any other country.

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They are entitled to the same rights as the people of any other country.

refuses to surrender his estate in satisfaction of the judgment, or where there is a strong presumption of fraud; (2) that section 5, chapter 77, of the statutes provides for the issuance of a capias in an action not based on fraud, and that that section is in conflict with section 12 of article 2, of our constitution; (3) that the declaration filed in the personal injury case and the special finding by the court did not show that the defendant drove and operated the machine, at the time in question, intentionally or maliciously against plaintiff, and therefore the Circuit court could not lawfully issue a body execution; (4) that the execution is void and of no effect because such an execution could not lawfully issue against an infant; and (5) that such execution could not lawfully issue against an infant unless there was a trial by jury. And as stated the prayer was that the capias be quashed and defendant discharged from the custody of the sheriff.

Defendant contends that an infant cannot lawfully be imprisoned under a body execution and cites Louis Casaler's Case, 139 Mass. 458. In that case it was held that under the statute of Massachusetts an infant was not liable to arrest for debt upon a civil process. However, no statute of Illinois is referred to on this point by counsel and we knew of none.

It is the firmly established law in this State that a capias ad satisfaciendum may be issued as a matter of course on a tort judgment and without an order of court. People v. Walker, 286 Ill. 541; Reinwald v. McGregor, 239 Ill. App. 240. And we have also held that such capias may be issued on a tort judgment and that the question whether malice was the gist of the tort action becomes material only when the judgment debtor applies to the county court for his discharge under the Insolvent Debtor's Act. Reinwald v. McGregor, supra. The capias having been issued according to law, the court correctly refused to quash it.

The order of the Circuit court of Cook county denying defendant's motion to quash the capias is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McBurely, J., concur.

37002

LEON SEGEL and
LEON SPITZENBERG,

Appellees,

v.

JACOB BOOS and HENRY BOOS,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 622⁵

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs, real estate brokers, brought an action against the defendants to recover \$450 claimed to be due them for commissions in obtaining a purchaser of real estate belonging to the defendants. There was a trial before the court without a jury, and a finding and judgment in plaintiffs' favor for \$435, and the defendants appeal.

The record discloses that plaintiffs were real estate brokers and were employed by defendants as such, to obtain a purchaser for a piece of property owned by them. The price fixed at which defendants would sell was \$9,000. Shortly afterward plaintiffs produced John Kowalski, introduced him to defendants, and showed him through the property. He offered \$8,500, which defendants refused to accept. Kowalski testified that a short time thereafter he was again passing the property and saw a sign of another broker on the property, took the matter up with the other broker and in a few days the deal was closed by the other broker, Kowalski paying \$8,700 for the property; there is evidence to the effect that defendants paid this broker \$375 commission. Plaintiffs learning of the sale demanded their commissions, and payment being refused this suit was brought.

There is little or no dispute in the evidence except

ALBERT W. KIRK
COUNTY OF CHICAGO

3781A.632

JAMES H. HARRIS
JAMES H. HARRIS
JAMES H. HARRIS

V.

JAMES H. HARRIS
JAMES H. HARRIS
JAMES H. HARRIS

ALL TESTIMONY OF JAMES H. HARRIS WILL BE THE DECISION OF THE COURT.

Plaintiff, real estate broker, brought an action against the defendant to recover \$200.00 to be paid for commission in obtaining a purchase of real estate belonging to the defendant. There was a trial before the court without a jury, and a finding and judgment in plaintiff's favor for \$200.00 and the defendant appeal.

The record reflects that plaintiff was real estate broker and was employed by defendant as such, to obtain a purchase for a piece of property owned by him. The price of which defendant would sell was \$200.00. Plaintiff introduced him to defendant, and showed him through the property. He offered \$100.00, which defendant refused to accept. Plaintiff called him a short time thereafter he was again showing the property and was a sign of another buyer on the property, took the money to give him other broker and in a few days the deal was closed by the other broker, Combs, paying \$200.00 for the property. There is evidence to the effect that defendant paid this broker \$200.00 commission, and plaintiff learned of the sale through their association, and payment being refused this suit was brought.

that defendants say that Kowalski, the purchaser of the property, was not introduced to them by plaintiffs. There was a dispute on this question and apparently the court was of the opinion that Kowalski was introduced to defendants by plaintiffs. The time the property was listed with plaintiffs until it was sold to Kowalski did not exceed more than 3 or 4 weeks.

The defendants contend that the evidence shows that Kowalski would not buy the property for \$9,000 and that this was the best price plaintiffs could obtain from the defendant owners, that thereupon Kowalski abandoned the idea of purchasing the property; that shortly thereafter Kowalski got in touch with the other broker, and through the efforts of the second broker the price was reduced to \$8,700, and the deal consummated; therefore, it is argued, plaintiffs were not the procuring cause of the sale.

We think that whether plaintiffs were the procuring cause was a mixed question of law and fact to be determined by the trial judge. He found in favor of the plaintiffs and we are unable to say that his finding is against the manifest weight of the evidence.

The fact that the property was sold at a less price than that at which the owners listed it with plaintiffs is not controlling, because it is the law that where an agent is employed to sell real estate for the owner and is instrumental in bringing the owner and the buyer together and afterward the owner, either through his own efforts or through those of another broker, sells the property at a less price than the first broker was authorized to sell it for, the first broker is entitled to his commission. Francisco v. Coleman, 230 Ill. App. 463; Hafner v. Barron, 168 Ill. 242; Wright v. McClintock, 136 Ill. App. 438; Wilson v. Mason, 158 Ill. 304.

It is to be regretted that defendants are required to pay

that defendant says that Kowalski, the defendant of the property, was not introduced to them by Kowalski. There was a dispute as to this question and apparently the court was of the opinion that Kowalski was introduced to defendant by Kowalski. The court the property was listed with plaintiff's name it was sold by Kowalski did not exceed more than 3 or 4 weeks.

The defendant contends that the evidence shows that Kowalski would not buy the property for \$4,000 and that this was the best price plaintiff could obtain from the defendant's offer. That thereupon Kowalski abandoned the idea of purchasing the property; that shortly thereafter Kowalski did in fact sell the other property, and through the efforts of the court which the price was raised to \$5,000, and the court accordingly awarded it in return, plaintiff's wife and the proceeds from the sale. We think that plaintiff's wife was the prevailing

cause was a mixed question of law and fact to be determined by the trial judge. We found in favor of the plaintiff and we now reverse to say that his finding is against the weight of the evidence.

The fact that the property was sold at a low price than that at which the amount listed it with plaintiff is not controlling because it is the fact that the court is required to sell that estate for the owner and is determined in relation to the other and the buyer together and allowed the owner, which means his and efforts of through sale of the property, which the court is a low price than the first price was awarded to sell it for. The trial judge is entitled to his conclusion. Reversed. 100 Ill. App. 401; 100 Ill. App. 401; 100 Ill. App. 401. It is so be reversed that defendant was entitled to pay

commissions to two brokers and probably this resulted from the buyer, Kowalski, getting in touch with the second broker apparently with a view of buying the property for less money; but the defendants should have been more careful and should have seen that the first brokers were not claiming that they had procured Kowalski to buy the property.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Hatchett, P. J., and McSurely, J., concur.

37010

U. GIOLLI,
Appellant,

v.

SERAFINO SILVESTRI and
FILOMENA ALFANO,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 623¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

January 23, 1933, plaintiff, the payee of a promissory note made by the defendants, caused judgment by confession to be entered for \$1174.23, which included \$134.48 attorney's fees. The note is for \$1209, as stated in figures, but in the body of the note the amount is written as \$1009.00; it is ^{dated July 20, 1932,} due six months after date, with interest at 6 per cent per annum, after maturity. It is the ordinary judgment note.

April 17, 1933, each of the defendants filed a petition to vacate the judgment and for leave to defend. Plaintiff filed a counter affidavit setting up facts tending to show that defendants were guilty of laches in not sooner moving to vacate the judgment. The motion of defendants to open up the judgment came on for hearing before the court without a jury and there is some confusion in the record. Witnesses were sworn and testified first with a view of showing that defendants were not guilty of laches in failing to move sooner to open up the judgment and there was evidence to show the contrary. There was also some evidence that went to the merits of the case. Plaintiff objected to this evidence but his objection was overruled, and at the conclusion of the hearing, the court vacated and set aside the judgment as to

37010

U. S. DISTRICT COURT
Appellate

REAR END DAMAGE
TILLY'S ALIBI
Appellate

REAR END DAMAGE
TILLY'S ALIBI

37010

REAR END DAMAGE TILLY'S ALIBI

January 23, 1932, Plaintiff, the party of a previously
 note made by the defendant, caused judgment by confession to be
 entered for \$17.43, which included \$14.43 attorney's fees.
 The note is for \$100, as stated in figure, but in the body of
 dated July 20, 1932, it is written as \$100.00; it is six months
 after date, with interest at a per cent per annum, after maturity.
 It is the ordinary judgment note.
 April 17, 1932, each of the defendants filed a motion
 to vacate the judgment and for leave to defend. Plaintiff filed
 a counter affidavit setting up facts tending to show that defend-
 ants were guilty of laches in not sooner moving to vacate the
 judgment. The motion of defendants is based upon the judgment was
 on for hearing before the court without a jury and hence is some
 calculation in the record. Plaintiff moved upon and qualified that
 with a view of showing that defendants were not guilty of laches
 in failing to move sooner to set up the judgment and hence was
 evidence to show the necessity. There was also some evidence that
 went to the merits of the case. Plaintiff objected to this evi-
 dence but his objection was overruled, and at the conclusion of
 the hearing, the court vacated and set aside the judgment as to

defendant Filomena Alfano and dismissed the suit as to her. And further ordered that the judgment against the other defendant, Serafino Silvestri, stand to the extent of \$500; execution was stayed and the court reserved for further hearing the question as to whether Serafino owed anything in excess of the \$500, and plaintiff appeals.

Plaintiff contends that the judgment is wrong and should be reversed because the petitions filed by defendants to open up and vacate the judgment were insufficient, and that they must be considered as brought under sec. 21, of the Municipal Court act, the petitions having been filed more than 30 days after the judgment was entered; there is considerable argument on this point. It has no bearing on the question involved. Sec. 21 does not apply to judgments by confession because such judgments may be opened up after the 30 days and if so opened up, the order to this effect is not appealable. This has long since been the firmly established law in this State. But plaintiff appealed not only from the order vacating the judgment but also from the dismissal of his suit against the defendant Filomena Alfano. This, of course, is a final and appealable order.

The petitions filed by defendants tended to show that the note in suit was without consideration and that there was not such delay in filing the petitions as would bar them from having the judgment opened up in case they showed a meritorious defense. The court was unwarranted in dismissing the suit as to the defendant Filomena Alfano and, we think, was equally unwarranted in ordering the judgment ^{for \$500} to stand against the other defendant. We are clear that the court should have vacated the judgment as to both defendants, allowing the judgment to stand as security and then should have set the case for hearing on the merits.

defendant William Adams and himself the said Adams, and
 further showed that the judgment against the other defendants,
 bearing date the 15th of 1890, stands as the order of 1890, and that the
 stayed and the court reserved for further hearing the question
 as to whether hearing over coming in order of the law, and
 plaintiff appeals.

Plaintiff contends that the judgment is wrong and should
 be reversed because the petition filed by defendant is one of
 and vacate the judgment were inadvisable, and that they were not
 considered as brought under sec. 11 of the Michigan Court Act,
 the petition having been filed more than 30 days after the judgment
 was entered; there is considerable argument on this point. It has
 no bearing on the question involved. And it does not apply to
 judgments by confession because such judgments may be opened up
 after 30 days and it is opened up the order of the court is
 not applicable. This has been the policy established
 law in this case. But plaintiff appeals and only from the order
 vacating the judgment but also from the statement of his case against
 the defendant William Adams. This, of course, is a final and
 appealable order.

The petition filed by defendant Adams is now that
 the note in suit was without consideration and that Adams was not
 even truly in filing the petition as being for Adams from having the
 judgment opened up in case they showed a material mistake. The
 court was disappointed in dismissing the case as in the defendant
 William Adams and, we think, was equally disappointed in reversing
 the judgment. The record against the other defendants. In the first
 that the court should have vacated the judgment as to both defendants,
 and, allowing the judgment to stand as recorded and then should
 have set the case for hearing on the merits.

For the reasons stated, the judgment of the Municipal court of Chicago is reversed and the cause remanded with directions to open up the judgment and to give defendants leave to defend, the judgment to stand as security.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, F. J., and McGuirely, J., concur.

For the reasons stated, the judgment of the Circuit Court of Chicago is reversed and the case remanded with instructions to open up the judgment and to give judgment as follows: Reversed, the judgment is set aside as hereby.

Reversed, the judgment is set aside as hereby.

37050

CHICAGO TITLE & TRUST COMPANY,
a Corporation, as Trustee,
Appellee,

vs.

CLARENDON BEACH HOTEL COMPANY,
a Corporation, et al.,

On Appeal of FRED E. HUMMEL,
Trustee in Bankruptcy in the Estate
of Wollenberger & Company, Bankrupt,
Appellant.

APPEAL FROM SUPERIOR
COURT OF COOK COUNTY.

273 I.A. 623²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Complainant filed its bill to foreclose a trust deed given to secure a bond issue of \$200,000 issued by the defendant Hotel company. Apparently the bond issue was underwritten by the defendant, Wollenberger & Company, and the bonds were payable at that company's office, and it apparently also sold all of the bonds. Afterward, as the bonds came due they were apparently presented to Wollenberger & Co. for payment, and sufficient money not having been made available by the Hotel company, the maker of the bonds, Wollenberger & Co. advanced its own money to the extent of more than \$29,000 and obtained bonds for that amount. The case was referred to a master who took the proofs and made up his report. He found, among other things, that there was due to the owners of certain bonds more than \$199,000 and to the defendant, Hummel, as trustee in bankruptcy for Wollenberger & Co., (that company having been adjudged a bankrupt) more than \$29,000, and recommended that a decree of foreclosure be entered in the usual form. The bonds held by the trustee of Wollenberger & Co. were treated the same as the bonds held by the other parties.

When the matter came on before the chancellor - although it is stated no objections or exceptions had been made to the master's report - the chancellor on his own motion held that the bonds, aggregating \$29,000 and held by the trustee in bankruptcy, should be

CHICAGO TITLE & TRUST COMPANY,
a Corporation, as Trustee,
Appellee,

vs.

CLARENCE BROWN HOTEL COMPANY,
a Corporation, as Plaintiff.

On Appeal of JUDY E. BROWN,
Trustee in Bankruptcy in the Estate
of Wollenberger & Company, Limited,
Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant filed its bill to foreclose a trust deed given to secure a bond issue of \$25,000 issued by the defendant hotel company. Apparently the bond issue was negotiated by the defendant, Wollenberger & Company, and the bonds were payable at that company's office, and it apparently sold all of the bonds. Afterward, as the bonds came due they were apparently presented to Wollenberger & Co. for payment, and sufficient money not having been made available by the hotel company, the owner of the bonds, Wollenberger & Co., advanced its own money to the extent of more than \$25,000 and obtained some for cash payment. The bank was referred to a master who took the proceeds and made up his report. He found, among other things, that there was on the estate of certain bonds more than \$25,000 and to the defendant, hotel company, as trustee in bankruptcy for Wollenberger & Co., (that company having been adjudged a bankrupt) more than \$25,000, and recommended that a decree of foreclosure be entered in the usual form. The bonds held by the trustee of Wollenberger & Co. were treated the same as the bonds held by the other parties.

When the matter came on before the master - although it is stated no objection or exception had been made to the master's report - the Chancellor on his own motion said that the bonds,

27030

CHICAGO TITLE & TRUST COMPANY,
a Corporation, as Trustee,
Appellee,

vs.

CLARENCE BROWN HOTEL COMPANY,
a Corporation, as Plaintiff.

On Appeal of JUDY E. BROWN,
Trustee in Bankruptcy in the Estate
of Wollenberger & Company, Limited,
Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant filed its bill to foreclose a trust deed given to secure a bond issue of \$25,000 issued by the defendant hotel company. Apparently the bond issue was negotiated by the defendant, Wollenberger & Company, and the bonds were payable at that company's office, and it apparently sold all of the bonds. Afterward, as the bonds came due they were apparently presented to Wollenberger & Co. for payment, and sufficient money not having been made available by the hotel company, the owner of the bonds, Wollenberger & Co., advanced its own money to the extent of more than \$25,000 and obtained some for cash payment. The bank was referred to a master who took the proceeds and made up his report. He found, among other things, that there was on the estate of certain bonds more than \$25,000 and to the defendant, hotel company, as trustee in bankruptcy for Wollenberger & Co., (that company having been adjudged a bankrupt) more than \$25,000, and recommended that a decree of foreclosure be entered in the usual form. The bonds held by the trustee of Wollenberger & Co. were treated the same as the bonds held by the other parties.

When the matter came on before the master - although it is stated no objection or exception had been made to the master's report - the Chancellor on his own motion said that the bonds,

subordinated to the \$159,000 due and owing to the other bondholders, and a decree was accordingly entered. Hummel, the trustee in bankruptcy of the estate of Wollenberger & Co., appeals and contends that the bonds held by him should not have been subordinated to the other bonds, and his counsel say in their brief that the chancellor on his motion "held that the bonds and coupons so owned and held by this defendant were subordinated to all other bonds and coupons outstanding and unpaid, on the theory that Article 11, Section 2 of the trust deed, which provides that bonds and coupons taken up by Wollenberger & Company with its own funds are deemed to have been purchased by it and shall be held by Wollenberger & Company with its security in no way impaired, was void as against public policy." Just why the provision of the trust deed was against public policy and void is in no way pointed out nor is there even a suggestion on this, the crucial question in the case.

The complainant, the Chicago Title & Trust Co., as trustee in the trust deed, has filed a brief, but its counsel likewise have given no information on this point. There is not a single case cited in complainant's brief nor is any argument made for or against the holding of the chancellor; and counsel say that "Because the position of the appellee as trustee for all bondholders requires that it maintain an impartial attitude in a controversy *** appellee submits to the court for its serious consideration and decision the questions as to whether or not the provisions of the trust deed" above referred to and the acquisition of the bonds aggregating \$29,000 by the underwriting house is contrary to public policy. Obviously, this brief is of no assistance to the court. So we have but a brief on one side of the case - that filed on behalf of Hummel, the trustee. Section 2 of the trust deed provides that in case Wollenberger & Co. shall at any time pay out their individual funds to the holder or holders of any bonds the amount due thereon, such

bonds shall be deemed to have been purchased by Wollenberger & Co. and shall be delivered uncanceled to them and shall become its property without the necessity of any notice being given of any such purchase to the holders of any of the other bonds, and that no such payment shall be considered a voluntary payment for the benefit of the mortgagor or for the benefit of any other bondholder, nor shall such a payment operate to effect the retirement of such bonds or in any way impair the security given by the trust deed/

Under the circumstances in which this question is presented, we do not pass on the validity of the provision of the trust deed in question; but we are of opinion that the decree can not stand because there is no showing that any part of the bonds aggregating \$29,000 was acquired by Wollenberger & Co. before all the bonds were disposed of to the public; nor is there any evidence in the record, that has been pointed out, which shows there was any default in payment by the Hotel company before the bonds were all disposed of to the public. So that the record fails to show that any of the owners or holders of the bonds aggregating \$199,000 were in any way prejudiced by the act of Wollenberger & Co., in taking up the \$29,000 bonds. Plaintiffs having suffered no injury on account of the action of Wollenberger & Co. in the respect mentioned, ought not to have their bonds held to be preferred over those acquired by Wollenberger & Co.

The decree of the Superior court of Cook county is reversed and the cause remanded with directions to enter a decree in accordance with the recommendations of the master.

REVERSED AND REMANDED WITH DIRECTIONS.

Matchett, P. J., and McSurely, J., concur.

37068

ANNE NEELY,
Appellee,

vs.

YELLOW CAB COMPANY,
a Corporation,
Appellant.

83
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

273 I.A. 623³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover the value of jewelry and other personal property she claimed to have lost through the negligence of one of defendant's cab drivers, in driving away before plaintiff had time to see that all of her property had been removed from the taxicab. There was a jury trial and a verdict and judgment in plaintiff's favor for \$900 and defendant appeals.

The record discloses that on the morning of May 7, 1932, plaintiff arrived in Chicago from Omaha on a Chicago & North Western train. She had two handbags, one large, containing wearing apparel, and a small one containing some wearing apparel and a small leather jewel box which contained jewelry. She rode in a taxicab from the North Western railroad station to Michigan avenue and Randolph streets where she entered a store, taking her two bags, and where she transacted some business. Shortly thereafter she took her two bags, which she had left with an employee of the store, went out on Michigan avenue, hailed a Yellow cab, got into the cab, placed the small bag to her left on the seat and the large one at her feet, and directed the driver to take her to the LaSalle street railroad station at Van Buren and La Salle streets. The cab drove into the regular driveway of the station and stopped at the proper place for plaintiff to alight. At that time a "red cap" or usher employed by one of the railroad companies opened the cab door; plaintiff alighted, stepped forward to pay her fare, and the

27088

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MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover the value of jewelry and other personal property not of value to have lost through the negligence of one of defendant's employees, in driving away before plaintiff and his son that of her property had been removed from the premises. There was a trial and a verdict and judgment in plaintiff's favor for \$100 and defendant appealed.

The record discloses that on the morning of May 7, 1922, plaintiff arrived in Chicago from Iowa on a Chicago & North Western train. She sat on the train, and the first, second and third class cars and a baggage car containing some wearing apparel and a small leather towel bag which contained jewelry. The train was a limited train and North Western railroad station is situated at Chicago and defendant's store where she worked a store, having her own home, and where she resided with her children. Shortly after plaintiff and her son had left the store and left in a vehicle of the store, with only an English woman, called a "Jenny" and, and they were seen, the small bag to her left on the seat and the jewelry was at the feet, and the driver of the car was in the driver's seat. The car drove without stopping to the store and it was there. The car drove into the regular driveway of the station and stopped at the platform where the plaintiff is seated. It was then a "red" car of the station and the plaintiff was seated on the car. The car was then employed by one of the railroad companies around the city and the plaintiff alleged, through the record to say that she, and the

usher removed the large bag, placed it on the floor and closed the cab door. When plaintiff had paid the driver his fare, he drove away in the usual manner. Plaintiff then turned around and saw but one of her bags; she and the usher endeavored to stop the cab, which was then about 100 to 150 feet away, leaving the station, but apparently on account of the noise made by several cabs then in the station he did not hear them and drove away. As far as the record shows no one has since seen the small bag which plaintiff says she left on the seat of the taxicab.

It further appears from the evidence that plaintiff immediately made complaint to the officials of the Cab company and the railroad company, who were then in the station, and notified them of her loss. At that time she filed a written claim with the Railroad company in which she fixed the value of the property she had lost at \$525.

Plaintiff's statement of claim, in addition to charging the defendant with negligence in driving the cab away before plaintiff had time to remove all her property, charged defendant with converting the property to its own use. After the verdict was returned by the jury, plaintiff, by leave of court, amended her statement of claim eliminating all charges except that of negligence.

The "red cap" or usher was called by each side and testified in substance that when the cab stopped at the proper place in the station he opened the cab door; that plaintiff then alighted from the cab and stepped forward; that while she was paying the cab driver he, the usher, took the large bag from the cab and placed it on the floor; that he did not see any other bag in the cab, and he thereupon closed the cab door; that the cab driver after receiving his fare drove away in the usual manner, and that plaintiff turned around and exclaimed that only one of her bags had been removed; that they then endeavored to stop the cab, which was 100 to 150 feet away, but were unable to do so. The only other witness who

upset reversed the large log, placed it on the floor and placed the cap door. When Alabailt had paid the driver his fare, he drove away in the usual manner. Alabailt then turned around and saw one of her passengers; and the driver answered to him the cap, which was then about 100 to 150 feet away, leaving the station, and apparently on account of the noise with the driver's head in the station he did not hear him and drove away. At 10:15 a.m. the report shows no one has since seen the small cap and Alabailt says she left on the seat of the train.

If further report from the witness could be obtained, it is still more essential to the officials of the cap company and the railroad company, who were then in the station, and Alabailt then at that time was told a station agent with the name of her father. At that time she took the value of the property and the road company in which she took the value of the property and the lost at \$500.

Alabailt's statement of claim, in addition to charging the defendant with negligence in driving the car away without Alabailt had time to remove all her property, charged defendant with negligence in driving the car away without Alabailt. After the verdict was returned by the jury, Alabailt, by leave of court, moved for judgment of claim affecting all charges except that of negligence.

The "red cap" of which was called by her name was testified in substance that when the cap started at the station place in the station he opened the cap door; that Alabailt then Alabailt then the cap was started toward; that while she was paying the cap driver he, the driver, took the large log from the cap and placed it on the floor; that he did not see any other person in the cap, and he thereupon closed the cap door; that the cap driver after receiving his fare drove away in the usual manner, and that Alabailt never returned and explained that only one of her bags had been returned; that they then endeavored to find the cap, which was 100 to 150

testified on the subject was the plaintiff.

The only witness testifying as to the value of the property plaintiff claims to have lost was plaintiff herself. She testified that her jewelry was in an old-fashioned red morocco jewel case which she carried in her small bag; that she had had experience in connection with the market price of jewelry of the kind she had lost; that shortly after her loss she looked at the same kind of jewelry at a jeweler's place of business in New York City and from this firm got an estimate of its value; that she had and for about twenty years a hobby for antique jewelry, and whenever she went to a large city would go to museums and jewelry stores where jewelry was displayed; that the jewelry she had lost was practically all antique - "I could tell the price of each;" that nearly all of the jewelry she lost were gifts except a few modern pieces; that all of the antique jewelry she had were gifts, some of them having been in her family for years; that she had examined jewelry in Chicago and New York and had visited approximately fifty places where jewelry was displayed and sold.

Plaintiff further testified, giving her opinion of the value of a number of the items she claimed to have lost. The values placed upon these items aggregated \$435. She was not asked about each item specifically set forth in her statement of claim. After testifying as to the value of the items above mentioned, aggregating \$435, she gave as her opinion that all of the jewels she had lost were worth \$900. She further gave her opinion that the value of items other than jewelry in the bag was \$35, making a total of \$935.

In this court defendant contends that plaintiff's testimony as to the value of her jewelry should have been excluded because she was not qualified. We think this contention cannot be sustained. While plaintiff could not properly be designated an expert on the

value of jewelry, yet she had sufficient experience to warrant the admission of her testimony; its weight or probative value was for the jury to decide, and in the absence of any evidence to the contrary we think we would not be warranted in holding that her evidence was insufficient. Moreover, as stated, plaintiff testified that she could tell the price of each piece of jewelry she had lost; but both court and counsel seemed to be of the opinion that the price paid for the jewelry was inadmissible on the question of value, and there is no contention to the contrary made in this court. The theory held by all the parties on this question is clearly erroneous, because what one pays for personal property at a fair sale - there being no circumstances that would cast doubt on the good faith of the transaction - is admissible to prove the value of an article. Glover v. Klattie, 231 Ill. App. 183. While the amount allowed by the jury seems somewhat excessive and more than might have been allowed had the responsibility been ours, yet we do not feel warranted, in view of all the evidence in the case, in disturbing the verdict of the jury, approved as it was by the trial Judge.

Defendant further contends that the court erred in overruling, at the close of all the evidence, its motion for a directed verdict; that the evidence shows plaintiff was guilty of contributory negligence, and that defendant was guilty of no negligence. But in any event, defendant says, the verdict is against the manifest weight of the evidence. As a general proposition, the question of negligence is one of fact for the jury, but ^{is} sometimes a question of law for the court where all reasonable minds would reach the conclusion that there was or was not any negligence. If there be any difference of opinion on the question, so that reasonable minds may not arrive at the same conclusion, then it is a question of fact for the jury. Gowald v. Courtney, No. 36897, opinion filed December

11, 1923; Kelly v. Chicago City Ry., 283 Ill. 640; Louthan v. Chicago City Ry. Co., 198 Ill. App. 329.

In the instant case the evidence of plaintiff is to the effect that when she alighted from the taxicab and stepped forward to pay her fare to the driver, a "red cap" was taking her baggage from the cab and placing it on the floor of the station; that the cab driver started to drive away before she had paid him his full fare, but she stopped him by requesting that he wait until she paid him in full; that when he was paid he drove away; that immediately she turned around and saw but one bag on the floor and complained that the other bag was in the cab. The question as to whether the cab man, in driving away under the circumstances disclosed by the evidence, was negligent, while not free from difficulty, we think was for the jury to decide. We are also of the opinion that whether plaintiff was guilty of negligence in failing to see that her two bags were removed from the taxicab, was also a question for the jury. And we are further of the opinion that we would not be warranted in disturbing the finding of the jury in favor of the plaintiff on the ground that it is against the manifest weight of the evidence.

Complaint is made that the court erred in instructing the jury. Counsel for plaintiff says (and this seems to be acquiesced in by counsel for defendant) that the court instructed the jury in part orally and part in writing. It is said that the court instructed the jury orally on certain propositions and then read other written instructions; but we think this does not mean that the court did not instruct the jury orally as to all of the charge within the meaning of the law. Counsel for defendant says that the instructions which the court read to the jury were not taken by the jury when they retired to consider of their verdict. The fact that the trial Judge read some of the instructions does not

make them written instructions, within the meaning of the law. Sections 73 and 74 of the Practice Act of 1907 provide that instructions shall be reduced to writing and that the judge shall write on the margin of those he approves the word "Given" and on those he rejects the word "Refused." The Municipal court, however provides that the court may instruct the jury orally, but it does not change the law that where the court instructs in writing he must mark the instructions he approves on the margin "Given." In the instant case all the instructions must be considered as oral instructions. In a great many cases it is the practice, not only in the Municipal court but in the Federal courts, where oral instructions are permitted, for counsel to submit in writing "suggestions" which the court reads as a part of his oral charge. Counsel for defendant orally made objections to some of the instructions, some of which were accepted by the court. A number of objections are now made to the instructions but we think they are not properly before us because not made at the time the instructions were given, which is the rule in the Municipal court where the instructions are orally given; and the fact that the court stated at the close of his instructions that counsel might have an exception to all of the instructions did not save the point. To be availed of on review, oral instructions must be specifically objected to before the jury retires.

The judgment of the Municipal court of Chicago is affirmed.

AFFIRMED.

Ketchett, F. J., and McSurely, J., concur.

36811

LEWIS K. EASTMAN,
Appellee,

vs.

E. F. WALSH et al.,
Appellants.

103
A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

273 LA. 623⁴

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants Walsh, Backus and Ringer (director, assistant director and supervisor, respectively, of the department of registration and education of the State of Illinois) and defendants Harris, Gilmore, Geiger, Fitzpatrick and Neal (members of a medical committee appointed by Walsh under authority of the statute to hear charges preferred against Eastman, a licensed physician) from a decree granting a permanent injunction restraining further proceedings on the charges. The bill was filed by Eastman January 13, 1933. Defendants interposed a general demurrer which was overruled, and they electing to stand by their demurrer, a decree was entered making a temporary injunction theretofore entered permanent.

The question for decision is whether the bill states a cause of action for equitable relief.

The bill avers that November 23, 1917, complainant was duly licensed to practice medicine and surgery in the state and that he has since been continuously engaged in that practice in Chicago; that he has enjoyed a good reputation and a lucrative practice; that Walsh is the acting director of the department of registration and education, and that it is his duty to draw up and prefer all charges of unprofessional conduct brought for the purpose of revoking the license of any physician and surgeon and cause the same to be set for hearing before the medical committee and at the conclusion of the hearing to act upon the report of the committee either revoking

the license or dismissing the charges; that defendant C. I. Backus is acting as assistant director for the department and takes the place of Walsh when Walsh is unable to perform his duties; that defendant Ringer is the acting supervisor of complaints for the department, and that it is his duty to prosecute such complaints; that Edwards is the chief inspector and his duties are to investigate all complaints, interview witnesses and prepare the evidence; that Drs. Harris, Gilmore, Geiger, Fitzpatrick and Deal are the duly appointed members of the so-called medical committee of the department of registration and education; that it is their duty to hear evidence in substantiation of and in defense of any and all complaints brought to the attention of the department and to report their findings to Walsh as director, or in his absence to Backus as assistant director.

The bill says that on the evening of April 25, 1932, there was announced and broadcast from certain radio stations the fact that charges had been filed against complainant for the purpose of revoking his license; that early editions of the morning papers of April 26th in Chicago carried lurid statements to the effect that complainant had been charged with malpractice and extortion, and that the revocation of his license would be sought.

The bill further avers that complainant appeared before the medical committee May 6, 1932, at 9:30 a. m., prepared to fully and adequately defend against these charges; that great newspaper publicity was given to the hearing; that the taking of evidence started on that morning and continued through the entire day of Friday and Saturday, and that when the entire evidence of the department had been received, the assistant attorney general in charge of the prosecution announced to the committee that in view of the contradiction and flimsy character of a great deal of the testimony produced, in an attempted substantiation of the charges, he would like

permission to withdraw and dismiss some of the charges and to amend the remaining ones and to possibly file additional charges; that complainant protested against this because of the unfavorable newspaper publicity which would thus go unanswered for an indefinite time to complainant's "incalculable damage"; that notwithstanding complainant's objection, the committee granted time to the assistant attorney general until May 11, 1932, to designate which charges would be dismissed, what amendments to the existing charges would be made and what new charges, if any, would be filed, and that the matter was continued indefinitely for further hearing without any opportunity granted complainant to introduce evidence in defense of the charges; that June 29, 1932, complainant not having in the meantime been notified of any further action by the department through his attorney caused to be written and mailed to the secretary of the committee a letter. The letter pointed out the prior proceedings, the statements of the assistant attorney general at that time, and stated that the committee had agreed to notify complainant as to just what charges would be dismissed and what new charges filed, but that nothing further had been heard of the committee for a period of nearly two months; that the whole matter had been given wide publicity in the newspapers and this unfavorable publicity had gone out to the public while complainant had absolutely no opportunity to refute the testimony; that an investigation made at the office of the department of registration and education revealed that the committee was scheduled to sit again on July 16th and that it was therefore urged very strongly that the committee should "arrange to either proceed with the hearing of the defense on these charges" or "enter a final order disposing of the charges."

The bill also avers that on July 16, 1932, complainant appeared before the medical committee by his counsel and demanded that the matter either be set for immediate hearing or the charges dismissed

permission to withdraw and similar cases at the same time as to amend
 the remaining ones was to consider this question of the withdrawal of
 complaint presented against the committee of the legislative body
 before which it was presented and to determine whether or not it should
 be referred to the committee of the legislative body; and if referred
 to the committee of the legislative body, the committee should be the judge
 and not merely a referee. It was, however, in 1904, at the time when the
 would be decided, that amendments to the existing laws were made
 and were now being made, it was, however, in 1904, at the time when the
 law was continued in effect for another period of time and of-
 ficially stated amendments to the laws were made in 1904, at the time
 the changes; that was in 1904, amendments were made in the laws
 close been notified of any further action by the committee of the
 his attorney caused to be written and called to the attention of
 the committee a letter. The letter pointed out the errors of
 laws, the statement of the committee of the legislative body in 1904,
 and stated that the committee had agreed to accept amendments to the
 laws that would be made in 1904, and that the committee of the
 laws would be made in 1904, and that the committee of the legislative
 body was now making amendments to the laws in 1904, and that the
 body in the committee and this committee of the legislative body was
 to the public with amendments and amendments to the laws in 1904,
 results was very much; that the committee of the legislative body
 the department of registration and education covering the laws
 which was amended in 1904, and that the committee of the legislative
 body agreed very strongly that the committee of the legislative body
 process with the passing of the laws in 1904, and that the
 final order of the committee of the legislative body.
 The bill also covers that in 1904, amendments were
 made before the committee of the legislative body and that the committee

that the committee entered an order upon the officials whose duty it was to make such charges, that the same should be made and should be concluded by July 26th; that the committee itself and other officials entirely ignored this order, and that thereupon complainant on July 26th caused a letter to be sent to the secretary of the medical committee, calling its attention to complainant's motion made July 16th to either grant an immediate hearing or dismiss the charges; that the officers in charge of the prosecution had wished additional time, and asked that the matter should be passed for a period of ten days, at which time it would be definitely disposed of; that no notice had been given of additional charges of any kind; that during all this time the charges had been bandied about in the newspapers without any opportunity for complainant to answer or disprove them, with a resultant damage and injury to complainant's practice and standing; that complainant had been assured that a definite disposal would be made of the matter, and that if the committee's order of July 16th that the matter should be tried or dismissed within ten days from that date was not carried out, it would be necessary to file mandamus proceedings to that end.

The bill avers that no further action having been taken, on August 2, 1932, complainant filed a petition for a writ of mandamus against defendants in the Superior court of Cook county; that defendants, as respondents in that action, "delayed and hindered the matter until finally his Honor Judge Ross C. Hall ordered the department to either proceed or dismiss the matter, and then, on August 30, 1932, a so-called amended citation was filed, in substance charging complainant with gross malpractice resulting in permanent injury or death of patients named, failure to use proper and required means in connection with the examination of patients to the end that a proper diagnosis might be made and proper remedies prescribed, failure to use care and caution required of a practi-

that the committee reported on July 18th and the following were the
 it was in some cases suggested, that the committee should be
 should be recommended by July 18th; that the committee should be
 other officials actively interested in this matter, that the committee
 complaint on July 18th caused a letter to be sent to the
 of the medical committee, asking the committee to examine
 and's motion made July 18th as either a letter to the committee
 or discuss the charges; that the committee is to be given
 action had asked additional time, and asked that the medical committee
 be passed for a period of ten days, as which time it would be well
 itself discussed of; that no notice was given of additional
 charges of any kind; that during the time the charges had been
 denied both in the newspaper and in the committee's report, and in fact
 not to answer or disprove them, with a resolution to make and inform
 to the committee's practice and procedure; that the committee had been
 asked that a definite decision should be made in the matter, and
 that if the committee's order of July 18th had not been made, it would
 tried or discussed with the committee on July 18th and the committee
 out, it would be necessary to the committee's responsibility to make
 The bill states that no further action should be taken,
 on August 7, 1937, notwithstanding that a report was made
 during the time of the committee's report on July 18th, and that
 between, as represented in the committee's report, and that the
 matter until finally the committee's report was made, and that the
 warrant to either proceed or suspend the matter, and that, on
 August 30, 1937, a so-called medical action was taken, in the
 stated charging committee with some negligence in the matter of
 permanent injury or death of patients named, failure to the proper
 and reported cases in connection with the examination of patients
 to the fact that a better decision might be made and proper remedies
 prescribed, failure to use such and certain reports of a patient.

tioner of the treatment of human ailments, failure to use judgment and discretion required of a practitioner, intentional neglect of patients for the purpose of increasing or enhancing damages to be recovered by patients in civil suits against the ^{persons} ~~persons~~ responsible for injuries which the patients had received. The names of the patients, particular injuries, etc., are set forth in detail, and complainant avers that a comparison of the amendment with the original citation shows such striking similarity as to indicate that the amendment practically amounts to a restatement of the original charges.

The bill further avers the statute relative to the hearing of such proceedings provides that the department shall not continue such a hearing for a period to exceed 30 days, and notwithstanding this specific provision, this purported hearing was continued over complainant's objection and demands from May 7, 1932, to September 9, 1932; that during this time two of the witnesses named who had testified in support of the purported charges voluntarily appeared and confessed that the testimony they had given before the department was wilful perjury, which they had been induced to commit by another doctor; that this confession of perjury was brought to the attention of the medical committee in open hearing July 16, 1932, but the committee ignored the situation and refused to dismiss the charges based on this admittedly false, untrue and perjured testimony.

The bill further avers that the statute (Cahill's Ill. Rev. Stats. 1931, chap. 91, par. 17, subhead "D") provides that no alleged improper acts of any licensed physician and surgeon committed more than three years before the hearing shall be inquired of or made the basis of any such charges, unless the physician or surgeon should be absent from the state during said period; that complainant for a period of more than ten years has been an actual and continued resident of the state of Illinois and engaged actively in his profes-

sion, but notwithstanding this plain provision of the law, and over the objection of complainant, defendants' prosecutor produced and the committee heard testimony of alleged improper conduct of complainant occurring more than eight years prior to the hearing; that in deliberate and utter violation of the provision of the law, Ringer and Edwards produced testimony of one Dunn to the effect that complainant had had an altercation with him arising out of an automobile collision, and that during this altercation complainant forcibly took Dunn to the hospital, threatened to commit actual violence upon him, and Dunn sued complainant for damages arising out of the alleged assault and recovered a judgment. These things, the bill avers, were alleged to have occurred more than seven years prior to the hearing and the filing of the complaint; that these charges were not in any way mentioned or referred to in the original or amended citation; that defendants likewise produced before the committee a witness named Hartlaub, who testified that more than eight years prior to the date of the filing of the original citation of charges, he, although not licensed to practice medicine and surgery, participated in the commission of an illegal abortion upon a woman not named, and that the woman had been taken to the Keystone hospital to save her life, and complainant discovering the facts extorted a mortgage on certain property owned by Hartlaub as purported "hush" money; that all these things were alleged to have occurred more than eight years prior to the filing of the charges or to the hearing; that this matter had not been mentioned in the written charges filed; that the witness against complainant admitted on cross examination that he had been convicted of practicing medicine without a license and fined; that notwithstanding same defendants never attempted to collect the fine or to imprison him, and that he is at liberty and had been continuously so from the time of his conviction without any appeal pending; that during the pendency of

this hearing this witness came to the office of the attorney of complainant and offered to repudiate his testimony for the sum of \$200; that this was brought to the attention of defendants, who disregarded it; that the committee and other defendants permitted the introduction of a vast amount of improper and unworthy hearsay testimony and testimony on matters not charged in either the original or the amended written charges and against which complainant had absolutely no opportunity to prepare a defense; that testimony was adduced in two cases where patients were brought to the Keystone hospital (upon the staff of which complainant is chief surgeon) suffering from results of an automobile accident, to the effect that complainant had attempted to force them to accept as their lawyer a lawyer designated and selected by him in the prosecution of their claim for damages; that there was no allusion to or mention of these matters in the amended charges filed and which were the only notices of any kind received by complainant informing him as to what he would be required to defend against.

The bill avers that the hearings were concluded on or about October 6, 1932; that complainant filed his written argument within 20 days after the argument of Ringer was prepared and served upon him; that on December 23, 1932, director Walsh sent to complainant a written notice to the effect that the medical committee recommended the suspension of complainant's license as a practitioner of medicine for a period of two years in accordance with the written report and recommendation of the committee, a copy of which was attached to and made a part of the notice; that complainant was further notified that he would have 20 days from that date to present his motion in writing for rehearing. Enclosed in said letter were the findings and recommendations of the defendants comprising the medical committee, which are set up at length verbatim.

The bill further avers that the report did not charge com-

This meeting with witness took place on the 10th of the month of
 September and related to the following: On the 10th
 of 1900; that this was brought to the attention of the witness, who
 testified that; that the committee was under the impression
 the intention of a great number of persons to attend the meeting
 feeling and feeling an interest in the subject in the way of a
 on the subject with regard to the subject in the way of a
 especially no opportunity to present a subject; that the witness
 although in the case of the witness was present in the way of a
 present (now the state of which was present in the way of a
 subject in the way of a subject in the way of a subject in the way of a
 just mentioned had appeared in the way of a subject in the way of a
 under a larger designation and referred to in the way of a
 of the subject in the way of a subject in the way of a subject in the way of a
 then of these matters in the way of a subject in the way of a subject in the way of a
 One only witness of any kind present by the witness in the way of a
 as to what he would be present in the way of a subject in the way of a

The bill passed and the witness was present in the way of a
 October 6, 1900; that the witness was present in the way of a
 20 days after the passage of the bill and the witness was present in the way of a
 him; that on November 20, 1900, the witness was present in the way of a
 a written notice to the witness in the way of a subject in the way of a
 the passage of the bill in the way of a subject in the way of a
 also for a period of two years in the way of a subject in the way of a
 and resolution of the committee, a bill in the way of a subject in the way of a
 to not make a part of the bill; that the witness was present in the way of a
 the bill in the way of a subject in the way of a subject in the way of a
 in writing for the witness. The witness in the way of a subject in the way of a
 and the witness in the way of a subject in the way of a subject in the way of a
 witness, who was not in the way of a subject in the way of a subject in the way of a

The bill passed and the witness was present in the way of a

complainant with gross malpractice which resulted in permanent injury or death of either of the patients named, but only that complainant was guilty of inefficiency and professional neglect, and that in one of the cases inefficiency and neglect consisted of failure to call in another physician and surgeon in a consulting capacity; that this is not cause for revocation under the provisions of the statute; that as to another patient the report charged inefficiency and professional neglect in failing to amputate the leg of a patient, although the patient admitted he had positively refused to permit complainant to amputate the limb; that other findings were that complainant had not called ^{other} in physicians who might have persuaded the patient to submit to an amputation; that this is not required by the statute nor denounced as constituting gross malpractice nor as any reason for suspension of the license of a physician or surgeon; that the committee also found complainant guilty of improperly instructing and inducing witnesses to testify, which likewise is not a ground for suspension under the statute; that the report of the committee, upon which they recommended the suspension of complainant's license, is based squarely and entirely upon the testimony as to conduct of complainant occurring over seven years ago and is therefore in direct violation of the specific limitation of the medical practice act; that another finding was that complainant had been guilty of lending his name to one Harry Lea, which finding was null and void and of no effect; that for these and other reasons the entire proceedings against complainant were in direct violation of his constitutional rights and the rights given him under the statutes and laws of the state of Illinois, and that Walsh as director, and the other defendants, unless prevented by injunction would enter an order in conformity with the report, in violation of the legal rights of complainant; that he was without an adequate remedy at law, "in that the only

alignment with these expectations was limited in the amount of
or both of either of the patients' cases, but only less completely
and was fully of incompetency and professional neglect, and that
in one of the cases involved by the action brought by the
to call in another physician and remove in a continuing manner
that this is not cause for revocation under the provisions of the
statute; that as to whether or not the patient's condition
and professional neglect in failing to remove the leg of a pa-
tient, although the patient admitted he had previously refused to
permit amputation so regarding the leg; that under Illinois law
that amputation had not called in ^{another} physician and that none was
called the patient is subject to no revocation; that this is not
required by the statute nor dependent on any other ground
practice nor as any reason for revocation by the board of
physician or surgeon; that the doctor also found competent
ability of incompetently practicing and rendering assistance to health,
which likewise is not a ground for revocation under the statute;
that the report of the committee, when taken into consideration the
suggestion of committee's finding, is based soundly and correctly
upon the testimony as to conduct of defendant's conduct from
seven years ago and is therefore in direct violation of the
specific limitation of the medical practice act; that another
finding was that amputation had been denied by the doctor's own
to one party less, when this was not, and that it be correct;
that for these and other reasons the Illinois board of medical
complaint were in direct violation of the constitutional rights
and the doctor given him under the statute and laws of the state
of Illinois, and that which is incorrect, and the other defendant,
unless prevented by legislation would enter in order to voluntarily
with the report, in violation of the public trust of society;
that he was without an adequate remedy at law, and that the only

remedy left him, after the suspension of his license, is by way of a certiorari to the Circuit court during the pendency of which his license would stand suspended or revoked, and that therefore orator is without remedy in the premises except in a court of equity."

The brief of complainant states his theory to be that defendants were engaged in an illegal conspiracy against him which had not thus far been consummated, and that each of the defendants in some respect or another was "actually and actively participating in and respectively contributing to the successful perpetration of said illegal conspiracy"; that unless a court of equity intervened complainant would suffer irreparable injury, and that "inasmuch as the only remedy open to complainant in a court of law, as distinguished from a court of equity, was to wait until the unlawful conspiracy had been successfully consummated by the defendants and suffer the irreparable injury necessarily attendant therewith, and then seek to have their acts set aside by certiorari, there was no adequate remedy in a court of law open to complainant." This theory, so far as this record discloses, appears to have been developed for the first time after the record was filed in this court. No conspiracy is mentioned in the bill. It is not permissible to deduct a conspiracy by inference from the language used (Clark v. Haggoner, 283 Ill. 199), but if it were permissible to make such inference, there is no language in the bill from which such conclusion might be reasonably drawn.

The practice of medicine and surgery, the procedure by which a license to practice is granted, and the procedure by which such license may be revoked are all set forth in the statute. (Smith-Murd's Ill. Rev. Stats. 1933, chap. 91, pp. 1835-1839.) Section 16b of chapter 91 provides in substance that before a license shall be revoked or suspended the holder must be summoned to appear; that no citation shall be issued except on a sworn complaint; that upon the

It is not possible to determine the exact date of the
the first meeting of the committee. The first meeting
of the committee was held on the 1st of January, 1941.
The committee was organized on the 1st of January, 1941.
The committee was organized on the 1st of January, 1941.

[illegible]

...the ... of ...

[illegible][illegible]

filing of such complaint the director shall issue a citation containing a copy of it, notifying the person of the time and place when and where the hearing will be had, commanding him to file his written answer under oath within 20 days, notifying him that if he shall fail to file such answer/default will be taken and his license may be suspended or revoked. It provides for procedure in case of a hearing and procedure in case of a default; and provides that in all cases the court shall have power to review the suspension or revocation by a writ of certiorari to the department, such writ to be issued by the clerk upon precept; that service shall be had upon the director, assistant director or superintendent of the department and may be had by mailing notice at least ten days before the return day of the writ; that in cases where the license has been suspended or revoked, such court may upon the filing of such suit by writ of certiorari upon a hearing and proper showing of probable error suspend the operation of such suspension or revocation during the pendency of the suit, and that either the department or the person affected may have the final judgment or order of the court reviewed by the Supreme court of the state in its discretion. There are other provisions which indicate the intention on the part of the legislature to confer jurisdiction upon the courts to the end that full and complete justice may prevail in any such proceeding.

Complainant says that the power of the department is not arbitrary or beyond investigation by the courts, citing People v. McCoy, 125 Ill. 289. It was so held in that case, which was an original action at law in the Criminal court of Cook county to recover a statutory penalty imposed by section 12 of the act of 1887. The case can hardly be regarded as authority for the interposition of a court of equity.

Complainant says that where it is apparent from the character

of such conditions the Director shall issue a license upon
 making a copy of it, including the return of the same and when
 when and where the hunting will be had, accompanied by an
 his written answer within ten days, detailing his views
 it be still held to this same investigation will be made and
 his license may be suspended or revoked. It is further provided
 before in case of a hunting and wherever in case of a license;
 and provides that in all cases the same shall have power to
 view the application or investigation by a writ of certiorari in the
 department, such writ to be issued by the District Court of the
 service shall be had upon the petition, and the same shall be
 suspension of the license and the same shall be held in force
 at least ten days before the return of the writ, and in case
 where the license has been suspended or revoked, such writ may
 upon the filing of such writ by writ of certiorari from a superior
 and proper showing of grounds thereupon the suspension of such
 suspension of the license shall be removed at the will and discretion
 either the Department or the District Court may issue the writ
 judgment or order of the court reviewed by the District Court of the
 state in the District. There are no provisions which in relation
 the inspection on the part of the Department or similar jurisdiction
 upon the same to the end that all such matters shall be
 will in any such proceeding.
 Commission was that the report of the Department is not
 existing or beyond investigation by the District Court, which is
 held, the D.C. 1901. It was an act to amend, amend and to
 original action of law in the District Court of the District of
 receive a certificate of title of land in the District of Columbia
 1907. The case was heard by the District Court of the District of
 decision of a court of law.

of the charges and the attitude of defendants that an accused will suffer irreparable injury, it is the duty of the court to intervene, and cites Ramsay v. Shelton, 329 Ill. 432, which was a suit in equity involving procedure under the present law. That case is similar to this in some respects but fundamentally and clearly is distinguishable from it, in that the bill there set up facts showing that the committee which was to try the complainant was illegally constituted. In this case the bill alleges facts showing that the committee was in fact legally constituted and legally authorized to proceed under the law. Doe v. Jones, 327 Ill. 392, is cited, but it differs from the instant case in that the bill there was based upon the theory that defendants were proceeding under an invalid statute. The validity of the statute under which the proceeding here in question is brought is not raised by any allegation in the bill. Potson v. City of Chicago, 304 Ill. 222, is cited, but in that case the authorities of the city were demanding that the petitioner should secure a license to conduct a restaurant which he owned, whereas, according to the allegation of the bill, there was no statute requiring him to obtain such license.

Complainant cites other cases, clearly distinguishable, such as O'Donnell v. Gearing, 291 Ill. 278, where complainant filed a bill to enjoin a trespass to land owned by him, where the trespass, according to the showing of the bill, resulted in irreparable damage. Bacchetti v. Inlander Paper Co., 252 Ill. App. 178, is cited, but that was a case where the court of justice of the peace rendered judgment in a case wherein there had been no service of a summons on the defendant. If the defendant had taken the case to the Circuit court by certiorari (as he might have done) the effect would have been to give the court jurisdiction without the service of summons. The remedy at law was therefore properly held to be inadequate.

It is undoubtedly true that equity will in proper cases assume

of the manner and the evidence in the case of the plaintiff - all
 after irreparable injury, it is the duty of the court to inter-
 vene, and after James v. Smith, 101 Ill. 407, which was a case
 in equity involving a mortgage upon the plaintiff's land. That case is
 similar to this in many respects and conclusively establishes the
 plaintiff's right to the bill, in that the bill there was for the same
 thing that the defendant sought to prevent the plaintiff from doing
 fully contemplated. In this case the bill alleges facts showing
 that the defendant was in fact actually committing and intending to
 commit the same wrong as in James v. Smith, 101 Ill. 407, is
 alleged to be committed under the law. James v. Smith, 101 Ill. 407, is
 cited, but it differs from the instant case in that the bill there
 was based upon the theory that the defendant was committing and in-
 tending to commit the same wrong as in James v. Smith, 101 Ill. 407,
 nothing here in question is shown to be not raised by any allegation
 in the bill. James v. Smith, 101 Ill. 407, is cited,
 but in that case the allegations of the bill were that the
 defendant should receive a license to commit a tortious act
 he owned, whereas, according to the allegations of the bill, there
 was no statute prohibiting him to commit such license.
 Conclusion of the court case, clearly distinguishable from
 as James v. Smith, 101 Ill. 407, which was a case in equity
 to enforce a contract as made by law, under the plaintiff, and
 nothing to be a case of the bill, treated in James v. Smith, 101 Ill. 407.
James v. Smith, 101 Ill. 407, is cited, but that
 was a case where the court of justice of the State rendered judgment
 in a case where there was no notice of a license to the de-
 fendant. If the defendant had asked for such a license he would
 be entitled (as he might have done) the court would have given
 to give the court jurisdiction without the notice to defendant. The
 result of the case is that the plaintiff's bill is to be maintained.
 It is accordingly that the bill is to be maintained.

jurisdiction where there is a remedy at law which, however, is inadequate, as held in Caldwell v. Moffat, 215 Ill. App. 583, and Wills v. County of Pike, 235 Ill. App. 499, but in each of these cases there were unusual circumstances very different from any which are made to appear by the bill filed in this case.

On the other hand, the rule in this State is firmly established that where complainant has a plain, adequate and complete remedy at law which has not been exhausted, he cannot resort to a court of equity. County of Cook v. Davis, 143 Ill. 154; Miller v. Barto, 247 Ill. 109; Chinicuy v. Christophei, 318 Ill. 101; Greenburg v. Holmes, 100 Ill. App. 102; Chicago & Joliet Elec. R. R. Co. v. Ferguson, 106 Ill. App. 356; Menion v. Pohl, 113 Ill. App. 102; Manhattan State Bank v. Moritz, 238 Ill. App. 111.

A careful perusal of the whole bill here discloses that complainant desires to avoid the procedure which is by statute applicable. He failed to make a motion for rehearing, for which the statute provides. The Supreme court has held that the neglect of an accused to avail himself of this provision is fatal to a bill for equitable relief. Bodenweiser v. Dept. of Reg. & Education, 347 Ill. 115.

The legislature has the undoubted right to confer jurisdiction in special statutory procedures upon such courts as it may choose to the exclusion of others, where the fundamental rights of persons receive adequate protection. It has been so held in many cases. People v. McGeorty, 270 Ill. 610; White v. City of Ottawa, 318 Ill. 472; Des Plaines Foundry Co. v. Des Plaines, 335 Ill. 216. In such case there is no necessity for the intervention of a court of equity. Illinois Bell Tel. Co. v. Commerce Com., 306 Ill. 109; Fidelity Investment Assoc. v. Emerson, 235 Ill. App., 21. There are also cases which specifically hold that certiorari provides an adequate remedy at law. Reid v. Stock Yards, 88 Ill. App. 32;

Chapman v. Kane, 97 Ill. App. 567; Lewis v. Bates, 40 N. Y. 164;
Grandchamp v. McCormick, 150 Mich. 232.

The decree of the Circuit court is reversed and the cause remanded with directions to dismiss the bill of complaint.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor and McGuirely, JJ., concur.

THE COURT OF THE DISTRICT OF COLUMBIA, IN THE MATTER OF THE ESTATE OF JAMES M. SMITH, DECEASED.

REPORT OF THE EXECUTOR, JAMES M. SMITH, JR., ON THE ACCOUNT OF HIS ADMINISTRATION.

The Executor of the Estate of James M. Smith, deceased, respectfully reports to the Court of the District of Columbia, in the matter of the Estate of James M. Smith, deceased, on the account of his administration, that he has, since the date of his appointment as Executor, faithfully and honestly administered the Estate of the said James M. Smith, deceased, and that he has, to the best of his ability, collected and realized all the assets of the said Estate, and that he has, to the best of his ability, paid out of the said assets all the debts and liabilities of the said Estate, and that he has, to the best of his ability, distributed the balance of the said assets to the persons entitled to the same, in accordance with the provisions of the will of the said James M. Smith, deceased, and in accordance with the provisions of the Act of Congress, approved March 3, 1879, relating to the administration of the estates of decedents dying intestate, and to the distribution of the assets of such estates.

Respectfully submitted, JAMES M. SMITH, JR., Executor.

37062

JUNE MOONEY,
Appellee,

vs.

METROPOLITAN LIFE INSURANCE
COMPANY, a Corporation,
Appellant.

104
A
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 624¹

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

In an action of assumpsit upon an insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of \$3225, upon which the court, overruling motions for a new trial and in arrest, entered judgment, which defendant asks us to reverse.

Plaintiff is the wife of Arthur Mooney, deceased, and the beneficiary named in an insurance policy upon which the action is based. Arthur Mooney in his lifetime was an employee of the Wabash Railway System, and the insurance contract upon which the suit is brought is known as a "group policy." It provided for indemnity in two respects: (1) \$3000 conditioned upon the death of the insured, and (2) \$3000 additional conditioned upon death from accidental causes.

Arthur Mooney, the insured, died July 4, 1931, in an automobile accident near Moresco, Indiana. Defendant paid to plaintiff beneficiary \$3000 life indemnity without prejudice to its right to contest its liability under the clause relating to death by accident. This suit was brought to recover on that promise of indemnity.

The policy provided that in case of accidental death defendant insurance company agreed to pay \$3000 additional upon proof that assured had sustained injury "as a result directly and independently of all other causes, of bodily injuries sustained, while insured hereunder, through violent, external and accidental means." The defense relied upon by defendant is that the death of Mooney was

ARTHUR HENRY, Appellant,

vs.

RETRIBUTION LIFE INSURANCE COMPANY, a Corporation, Appellee.

OF THE COURT.

37022 I.A. 624

MR. JUSTICE LORAN, J.
DELIVERED THE OPINION OF THE COURT.

In an action of contract upon an insurance policy and upon trial by jury there was a verdict for plaintiff in the sum of \$3222, upon which the court, overruling motion for a new trial and in arrest, entered judgment, which defendant seeks to reverse. Plaintiff is the wife of ARTHUR HENRY, deceased, and the beneficial named in an insurance policy upon which the action is based. ARTHUR HENRY in his lifetime was an employee of the Union Railway System, and the insurance contract upon which the suit is brought is known as a "group policy." It provided for indemnity in two respects: (1) \$2500 payable upon the death of the insured, and (2) \$3000 additional, contingent upon death from accidental causes.

ARTHUR HENRY, the insured, died July 1, 1931, in an automobile accident near Toronto, Ontario. Defendant said in affidavit voluntarily \$2500 life insurance policy provision for the right to contest the liability under the above policy in court by action. This suit was brought to recover on said provision of indemnity. The policy provided that in case of accidental death defendant and Insurance Company agreed to pay \$2500 additional upon proof that insured had sustained injury "as a result directly and exclusively of all other causes, of bodily injuries sustained, while insured, however, through violent, accidental and accidental means." The balance relied upon by defendant is that the death of Henry was

caused by or contributed to directly or indirectly, wholly or partly, by a diseased or bodily infirmity known as heart disease, and that there was no liability for that reason.

The evidence tends to show that deceased lived at 1534 East 65th street, Chicago, and that on the morning of July 4, 1931, with his wife, his daughter, and a Mrs. Harris, he started by automobile to Logansport, Indiana, driving south on route 41; that the deceased was driving and that as he approached Morocco, Indiana, he passed an automobile ahead of him, "cutting in" in front of it; that he lost control of his car which swerved from one side of the road to the other and collided with another automobile coming in the opposite direction. All of the occupants of the car in which deceased was riding were thrown out of the car. When deceased was picked up he was unconscious; he was taken to Morocco and never regained consciousness and died on the way.

The body was taken first to Morocco and on the same evening was brought to Chicago by the undertaker. Dr. Larrison, who examined the body, testified that in his opinion the death was caused from "heart failure." The Chicago undertaker testified that there was an injury to the forehead which he filled with a plastic substance. A number of witnesses testified that after the collision and while deceased was unconscious he was heard to moan several times. A bottle of digitalis (a heart stimulant) was found in his pocket.

Dr. Lapin called by plaintiff (subpoenaed by both sides) testified that he made an examination of the deceased about two weeks before the accident. He had treated deceased some time before. He says that at the time of his examination deceased said he was feeling all right but thought he might as well let the doctor take a look at him. Dr. Lapin says he took the blood pressure of deceased at the time of that examination, examined his heart and

caused by or contributed to directly or indirectly, bodily or mental, by a disease or bodily infirmity, except as shown otherwise, and that there was no liability for such reason.

The witness further testified that on the morning of July 1, 1934, at 8:30 a.m., Chicago, and that on the morning of July 1, 1934, with his wife, his daughter, and a Mrs. Martin, he started by automobile to Loganport, Indiana, driving south on Route 41; that the witness was driving the car as he approached Chicago, Illinois, he passed an automobile ahead of him, "cutting in" in front of it; that he lost control of his car which swerved from one side of the road to the other and collided with another automobile coming in the opposite direction. All of the occupants of the car in which the witness was riding were thrown out of the car. When the witness was riding he was unconscious; he was taken to a hospital and never regained consciousness and died on the way.

The body was taken first to a hospital and on the same evening was brought to Chicago by the undertaker. Dr. Martin, who examined the body, testified that in his opinion the death was caused from "heart failure." The witness further testified that there was an injury to the forehead when he fell out of the car at the collision. A number of witnesses testified that after the collision and while he was in the hospital he was taken to the hospital and while he was in the hospital (a heart ailment) was found in his pocket.

Dr. Martin testified by direct examination (and was cross-examined) that he made an examination of the deceased about two weeks before the accident. He had treated the deceased when she was ill. He says that at the time of his examination the deceased was feeling all right and thought he would be well for the doctor to see a look at him. Dr. Martin says he took the blood pressure of the deceased at the time of his examination, and found it was 120 over 80.

gave him a general physical examination; that his blood pressure was normal and his heart was "in a pretty good condition." The Doctor had given deceased treatment about a year before the accident and had advised him to take a rest at the hospital, which he did. His examination disclosed a murmur in the heart. He says: "That was about a year before the accident which caused his death. He did rest up at that time. I heard a murmur in his heart at that time and I figured a rest would probably help that too. I gave him some medicine which was some form of digitalis. I saw him after he had rested up. He felt a lot better and his condition was fairly well cleared up. Between that time and up to the time of his death I saw him practically daily; he was apparently in good physical condition. At that time I gave him medicine, I gave him liquid, about $\frac{1}{2}$ an ounce of, I believe it was, digalen; it was something to take in a dropper. I gave it to him just once. He didn't come back any more." On cross examination the Doctor said: "I wouldn't say his heart was normal, practically normal. It was a lot better. It was a little enlarged. The medicine I gave him would contract it. He didn't say anything ~~more~~ to me about more medicine." The Doctor also said that the deceased had informed him that he had been an athlete in his youth, and the Doctor said that men who have been in athletics to a considerable extent nearly always have enlarged hearts. He also stated that he heard deceased had an operation later at the hospital but that he did not treat him for that condition, and that Mooney was in his late forties when he treated him.

Dr. Linder, a veterinarian and also coroner of the county in Indiana where the accident occurred, testified that he assisted Dr. Larrison in the examination of the body; that there was a small bruise on the forehead and a bruise on the back; that he put pressure on the skull immediately over the bruise but could not determine whether it was a depressed fracture.

gave him a general physical examination; and his blood pressure was normal and his heart was "in a pretty good condition." The doctor had given deceased treatment about a year before the accident and had advised him to take a rest at his home, which he did. The examination disclosed a murmur in the heart. He says: "That was about a year before the accident which caused his death. He did not rest up at that time. I heard a murmur in his heart at that time and I figured a rest would probably help him too. I gave him some medicine which was some kind of digitalis. I saw him after he had rested up. He felt a lot better and his condition was fairly well cleared up. Between that time and the time of the accident I saw him practically daily; he was apparently in good condition and I gave him some medicine. At that time I gave him medicine, I gave him some medicine. In some of, I believe it was, digitalis; it was something he took in a capsule. I gave it to him three times. He did not feel any better. On cross examination the doctor said: "I was a bit doubtful. It was a little normal, practically normal. It was a bit better. It was a little enlarged. The medicine I gave him was digitalis. He did not feel anything better. He was a bit better. The doctor said that the deceased had informed him that he had been an athlete in his youth, and the doctor said that man who has been in athletics he is a constitutional athlete; he always has athletic power. He also stated that he never detected any abnormal factor in the deceased. He said that he did not treat him for that condition, was that wrong? He is his late father who he treated him.

Dr. Linster, a veterinarian and also partner in the company in Indiana where the accident occurred, testified that he witnessed the fall in the examination of the body; that there was a small bruise on the forehead and a bruise on the back; that he put pressure on the skull immediately after the fall and would not determine whether it was a depressed fracture.

Dr. Wright, brother-in-law of deceased, testified for plaintiff that he knew deceased ten years prior to his death; that he made a physical examination of him in May, 1931; that the heart showed no evidence of valvular leakage or disease; that the heart was not enlarged; that its rate and rhythm were normal and that the findings regarding it were negative; that he used a stethoscope and percussion hammer. He says that when he heard of the accident he went to Indiana and examined the body at the undertaking establishment in Morocco; that he found evidence of external injury on the forehead about an inch and a half above the left eyebrow; that there was an area of discoloration and contused or bruised area about $1\frac{1}{2}$ to $\frac{1}{2}$ inch long by 1 inch wide, which was swollen and discolored; that on the outer side of the left shoulder, the upper part of the arm, there was another area of discoloration about $2\frac{1}{2}$ inches in diameter; that there was another bruise of about the same size in the scapula region, that is, the back of the left shoulder and chest; an abrasion about 3 inches long on the skin below the elbow on the left forearm and minor scratches about the backs of the hands and both legs.

Defendant cites a large number of cases holding that there can be no recovery where there is a contributing cause and the policy contains a condition such as this one contained. Crandall v. Continental Casualty Co., 179 Ill. App. 330; Fitch v. Monarch Accident Ins. Co., 239 Ill. App. 479, are two of the numerous cases which hold that the burden of proof is on the plaintiff to show that the accident was the sole cause of death. It would serve no useful purpose to analyze these cases in detail. The Crandall case, where the opinion was written by Judge Carnes of the Second district, leaves little to be said upon the subject, which was discussed in a most thorough way. The same Judge in the later case of Strehlow vs.

Dr. Wright, physician-in-law of deceased, testified that
deceased had no new diseases and years prior to his death; that
he had a physical examination of him in May, 1920; that the heart
showed no evidence of valvular disease or disease; that the heart
was not enlarged; that the rate and rhythm were normal and that the
findings regarding it were negative; that he had a telephone con-
versation with him. He gave that from the report of the physician who
went to London and examined the body of the deceased, which was
sent in Mexico; that he found evidence of external injury on the
forearm about an inch and a half above the left elbow; that there
was an area of discoloration and contusion or bruise about 1 1/2
to 2 inch long by 1 inch wide, which was swollen and discolored;
that on the outer side of the left shoulder, the upper part of the
arm, there was another area of discoloration about 2 inches in
diameter; that there was another bruise of about the same size in
the axillary region, that is, the back of the left shoulder and
chest; an abrasion about 3 inches long on the skin below the elbow
on the left forearm and minor abrasions about the lower of the
hands and palm joints.

Deceased also a large number of scars, which that there
can be no recovery where there is a scarification wound and the
evidences containing a condition such as this are contained. Griffith v.
Continental Casualty Co., 178 Ill. App. 2d, 1921; 178 Ill. App. 2d,
1921, 472, 473, are two of the numerous cases
which hold that the burden of proof is on the plaintiff to show that
the accident was the sole cause of death. It would serve no useful
purpose to analyze these cases in detail. The Griffith case, where
the opinion was written by Justice Holmes of the second district, leaves
little to be said upon the subject, which was discussed in a most
thorough way. The same issue in the later case of Griffith v.

Aetna Life Ins. Co., 133 Ill. App. 50, points out that where the evidence is conflicting the question is for the jury under proper instructions by the court.

A collision in which a man in apparently good health is rendered unconscious and dies within a few hours thereafter without regaining consciousness, would seem to establish a prima facie case under a policy with a provision such as this one. The provisions of this policy, unlike some others, do not seem to include in its exceptions, direct causes. Of course, in one sense in every case of death heart failure is the controlling and proximate cause. The language of an insurance policy is construed most strictly against the insurance company and liberally in favor of the beneficiary, for reasons which are perfectly obvious and which have been repeatedly stated.

Defendant says that Dr. Wright, who was a brother-in-law of deceased, was disqualified to testify as an expert because he lacked impartiality. This would go to the weight of his testimony which would be a question for the jury. He was not incompetent.

It is urged that the court erred in refusing to give defendant's requested instruction No. 1. The brief of defendant does not set up the instruction, which the abstract shows to have been as follows:

"The court instructs the jury that even though you believe that the death of Arthur Mooney was caused by the accident in question, if you believe that his death was contributed to by disease or infirmity, then you must find the issues for the defendant."

The instruction was obviously erroneous since the jury were not informed that their decision must rest upon the evidence which was before them. The question of fact in this case was for the jury, and it is not urged that the verdict is against the manifest weight of the evidence.

There is no reversible error in the record, and the judgment is affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

37133

FRANK J. BROUCEK,
Appellant,

vs.

JOHN H. EHARDT,
Appellee.

105 17
APPEAL FROM COUNTY COURT
OF COOK COUNTY.

273 I.A. 624²

MR. PRESIDING JUSTICE WATCHETT
DELIVERED THE OPINION OF THE COURT.

Broucek filed a petition in the County court of Cook county on March 25, 1933, in which he set up that he had been arrested under a capias ad satisfaciendum issued in favor of John H. Ehardt, in the sum of \$5,000, and that he was in custody of the sheriff under the writ; that he desired to obtain an order for his release under the insolvent debtor's act (Cahill's Ill. Rev. Stats. 1931, chap. 72, par. 5, sec. 2). On April 21st thereafter the cause came on for trial, and the court having heard the evidence found that malice was the gist of the action upon which the capias issued and remanded petitioner to the custody of the sheriff. He prosecutes this appeal.

Petitioner urges that he was denied the right to be heard upon his petition and denied due process of law, in that he was not allowed to introduce evidence and in that the judgment upon which the capias issued was not entered upon the verdict of a jury.

The bill of exceptions shows a motion by petitioner for continuance of the cause, but the motion was not supported by any offered evidence tending to show facts which would justify a continuance. If petitioner deemed such a continuance necessary he should have filed an affidavit in support of his motion which would have made the facts appear to the court. There is nothing in this record which would justify us in holding that the court erred in denying such motion when unsupported by any showing as to the facts. The record shows that the petition was filed March 25, 1933; that on the same day petitioner gave bond and was released; that the

cause came on for hearing on April 21st. The bill of exceptions shows that there was a substitution of attorney for petitioner on April 21st, but there is nothing tending to show that the substituted attorney was unprepared to try the case. The issues are quite simple, and the procedure is not at all complicated.

Respondent offered in evidence the record of the Circuit court of Cook county in case No. B-197865, in which a judgment in favor of Ehardt and against Broucek was entered. The declaration was in two counts and was in the nature of a plea of trespass on the case. The first count averred that "contriving and maliciously intending to injure the plaintiff, and to bring him into public scandal and disgrace, on, to-wit, the 18th day of March, A. D. 1930, in the County aforesaid, in a certain discourse, which the defendant then and there had of and concerning the plaintiff, in the presence and hearing of divers persons, falsely and maliciously in the presence and hearing of those persons, spoke and published of and concerning the plaintiff the false, scandalous, malicious and defamatory words following: that is to say: 'John H. Ehardt (meaning the plaintiff) is a murderer.' 'John H. Ehardt (meaning the plaintiff) is an abortionist.'" The second count averred that at the same time and place defendant in violation of the statute broadcast over the radio in the hearing of divers persons of and concerning plaintiff "and further contriving and intending, as aforesaid, in the presence and hearing of those persons, falsely, and maliciously, in the hearing of those persons, spoke and published of and concerning the plaintiff, the false, scandalous, malicious and defamatory words, following: That is to say: 'He, John H. Ehardt (meaning the plaintiff) is a murderer.' 'He (meaning the plaintiff) poisoned a girl.' 'The people of Berwyn will not elect an ex convict Police Magistrate, that's why you will not vote for John H. Ehardt,' (meaning the plaintiff.)"

[illegible]

The record of the Circuit court case in evidence also shows that on March 16, 1933, the following proceedings were entered of record:

"On motion of plaintiff's attorney it is ordered that leave be and is hereby given the plaintiff to file his affidavit and plea herein instantler.

And thereupon this cause being called for trial ex parte comes the plaintiff to this suit by his attorney and it appearing to the court that neither the plaintiff nor the defendant have made demand or paid for trial by jury in this cause as required by the statute in such case made and provided this cause is submitted to the court for trial without a jury and the court now here after hearing all the evidence adduced and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages at the sum of Five Thousand Dollars (\$5000.00).

And thereupon the court enters herein its findings on the question as submitted to it by the plaintiff herein:

John H. Shardt

vs.

Frank J. Broucek

Case No. B-197866

INTERROGATORY

Was the conduct of the defendant, Frank J. Broucek, as shown by a preponderance of the evidence, expressly malicious and actuated by an evil intent design and purpose?

Answer: Yes.

Martin H. Finneran
Judge

Therefore it is considered by the court that the plaintiff do have and recover of and from the defendant, Frank Broucek, his said damages of Five Thousand Dollars (\$5000.00) in form as aforesaid by the court assessed together with his costs and charges in this behalf expended and have execution therefor."

The main contention of petitioner seems to be that the capias should not have issued upon this judgment because the record shows that there was in fact no trial by jury. He cites article 11, section 12 of the Constitution of 1870, which provides:

"No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law, or in cases where there is strong presumption of fraud."

It is perfectly apparent (and has been held so often that the citation of authorities would seem unnecessary) that this provision of the Constitution is not applicable to a judgment entered based upon a cause of action in tort as distinguished from one which is based upon contract. Petitioner also contends, citing para. 763, chap.

38 (Smith-Hurd's Ill. Rev. Stats. 1933) and para. 176, chap. 79 (Smith-Hurd's Ill. Rev. Stats. 1931) that by reason of the statute imprisonment is illegal except upon conviction upon trial by jury. Petitioner relies on Monaster v. Kleschke, 297 Ill. 431, which construes the statute. The difficulty with this contention is that the statute in question has been expressly held unconstitutional by the Supreme court of this State in the later case of Stirling & Burn Mfg. Co. v. Nathan S. Pastel, 301 Ill. 253. This court is, of course, bound by that ruling of the Supreme court irrespective of any opinion which we may entertain.

Petitioner also contends, citing Ostrobenay v. Marczaitis, 139 Ill. App. 94, that where a defendant enters its appearance the proper form of judgment is nisi and further says, citing American Mail Order Co. v. Marsh, 118 Ill. App. 248, that after default defendant is entitled to notice of proceedings in order that he may cross examine the witnesses as to the amount of damages. This judgment, however, was not rendered upon default. The hearing was ex parte, but the record shows that defendant had filed a plea and that defendant Broucek made no demand that his case should be heard by jury. The cases are therefore not applicable. Moreover, if error in any such respect did intervene, it could be corrected only upon appeal or by writ of error, and such error could not be made the basis for a collateral attack upon the judgment.

Petitioner cites the thirteenth amendment to the Constitution of the United States which forbids slavery, or involuntary servitude, except as punishment for crime. No case is cited, and we presume that none can be found, holding that an arrest by sheriff under a capias constitutes either slavery or involuntary servitude. The provision of the statute to which petitioner appeals has often been construed by the courts of this State. Jernberg v. Mix, 199 Ill. 254; Levy v. Schikowski, 239 Ill. App. 447;

Abbrassart v. Bouchard, 241 Ill. App. 484; Stoike v. Bonasera, 243 Ill. App. 381; Mantake v. Bhutassel, 248 Ill. App. 492; Scanlon v. Whalen, 249 Ill. App. 19; Carone v. Teiszeraki, Gen. No. 36827, in which an opinion filed November 6, 1933, is not yet reported.

It has been consistently held in these cases that where there are several counts in the declaration, some of which state a cause of which malice is not the gist and others in which malice is the gist, such record prima facie shows malice and that the burden is cast upon petitioner to prove that malice is not in fact the gist of the action.

In this case both counts of the declaration filed in the suit brought in the Circuit court expressly charge malice. The record does not show a scintilla of testimony offered or received tending to disprove malice. The record also fails to show that any objection was made by petitioner to any of the evidence offered or received in behalf of the respondent.

There is no error in the record, and the judgment of the trial court is therefore affirmed.

AFFIRMED.

O'Connor and McSurely, JJ., concur.

37151

CORNELIUS BURKE,
Appellant,

vs.

CONTINENTAL LIFE INSURANCE COMPANY
OF ST. LOUIS, MISSOURI,
Appellee.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 624²

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

Plaintiff sued in contract in an action of the fourth class based on an insurance policy known as a "travel and pedestrian accident policy." The amended statement of claim averred that plaintiff sustained an accident on December 13, 1932, while a fare-paying passenger on one of the street cars of the Chicago Surface Lines; that he sustained injuries which resulted in damage to the amount of \$93.35; that under the terms of the policy (with all of which it was averred he had on his part complied) he was entitled to recover that amount.

The affidavit of merits denied the injuries alleged and averred that the policy of insurance was a limited and restricted policy which provided indemnity only "to the extent therein limited and provided" and that defendant was not liable under its terms and provisions.

There was a trial by the court without a jury. The court found the issues for defendant and against plaintiff, denied a motion for a new trial and entered judgment accordingly. Plaintiff has perfected this appeal.

There is practically no dispute as to the facts, and the question for determination is whether under the facts as established plaintiff is entitled to recover.

The evidence tends to show that on December 13, 1932, plaintiff was riding as a pay passenger in a street car westward

1912

COMMERCIAL BANK,
Chicago, Ill.

vs.

CONTINENTAL LIFE INSURANCE COMPANY,
OF NEW YORK, N.Y.,
Assignee.

1912

THE CONTINENTAL LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.

THE COMMERCIAL BANK OF CHICAGO,
Defendant.

Plaintiff moved in court for an order of the court
class based on an insurance policy issued as a "policy" and policy-
from accident policy." The accident occurred in 1907, while a
first plaintiff was on an accident on December 12, 1907, while a
late-paying payment on one of the above said of the Chicago
Insurance Lines; that he retained interest in the policy from
to the amount of \$10,000; that under the terms of the policy (and
all of which it was agreed he had on his own account) he was
entitled to receive that amount.

The plaintiff in error denied the injury alleged and
averred that the policy of insurance was a "policy" and "policy"
policy which provided insurance only for the entire amount of the
and provided" and that defendant was not liable under the terms
and provisions.

There was a trial by the court without a jury. The court
found the issues for defendant and against plaintiff, finding a
motion for a new trial and setting judgment accordingly. Plaintiff
has petitioned this court.

There is practically no dispute as to the facts, and the
question for determination is whether under the facts as established
plaintiff is entitled to recovery.

The evidence tends to show that on December 12, 1907,
plaintiff was riding on a car conveyed in a street car conveyed

bound on Grand avenue; that he boarded the car, paid his fare, started to walk through the car from the rear to the front; that as he reached the front door (inside the car) the car made a sharp turn and he was thrown against the window. He threw up his hand and it went through the inside pane of glass. He sustained a gash, which he described as a kind of "ragged cut about an inch and a quarter," on his right hand.

Plaintiff continued his ride on the car to Harlem avenue (an intersecting north and south street), where he alighted, went into a drug store and received first aid. Thereafter he was attended by his physician at whose office he called about twelve times for the purpose of receiving treatment. Plaintiff was an operating engineer. He was employed, and his duties were to take care of the heaters, boilers and furnaces of his employer. He says he became unable to perform these usual duties for his employer for 28 days and was confined to his home. An adjuster for defendant testified that plaintiff told him he was away from his work on account of the accident only two weeks, but plaintiff denied he had any such conversation with the adjuster.

The consideration for the insurance policy was a subscription by plaintiff to a newspaper and the payment of ten cents premium per month. The policy limited the indemnity to such disability as might result "directly, independently and exclusively of all other causes from bodily injuries effected solely through external, violent and accidental means." By another provision the payment of the indemnity was conditioned upon the circumstance that the insured should be "from date of accident, wholly disabled and prevented by injuries so received, from performing any and every duty pertaining to any business or occupation." It is argued that these provisions exclude liability under the policy under facts as here disclosed.

beard on Grand avenue; that he passed the car, and the car started to walk through the car from the front to the rear; that as he reached the front door (inside the car) the car was a thirty feet and he was thrown against the window. He threw his hand and it went through the inside pane of glass. He sustained a laceration, which he described as a kind of "ragged and jagged" laceration, and a "quarter" on his right hand.

Plaintiff continued his ride on the car to Grand avenue (an interesting note and south street), where he alighted, went into a drug store and received first aid. Thereafter he was attended by his physician at whose office he called about twelve times for the purpose of receiving treatment. Plaintiff was an operating engineer. He was employed, and his duties were to take care of the boilers, belters and rollers of his employer. He says he became unable to perform these duties for his employer for 18 days and was confined to his home. An attorney for defendant testified that plaintiff told him he was away from his work on account of the accident only two weeks, and plaintiff admitted he had any and conversation with the attorney.

The consideration for the insurance policy was a subscription by plaintiff to a newspaper and the payment of two cents premium per month. The policy limited the liability to death disability as might result "directly, indirectly and exclusively" of all other causes from bodily injuries suffered solely through external, violent and accidental means. By another provision the payment of the indemnity was conditioned upon the circumstances that the insured should be "free from any and every kind of disability and prevented by injuries or accident, from performing any and every duty pertaining to any business or occupation." It is argued that these provisions exclude liability under the policy under facts as here disclosed.

The language of this contract is that chosen by the insurance company, and under a well settled rule it will, in case of ambiguity, be construed most strongly against defendant and liberally in favor of the insured. Practically all the cases so held, and we therefore cite only a few. Healy v. Mutual Accident Assoc., 133 Ill. 559; Murray v. Kaskaskia Live Stock Ins. Co., 204 Ill. App. 568; Joseph v. New York Life Ins. Co., 308 Ill. 93. Applying this rule of construction, we think it must be held that plaintiff's injuries, insofar as his own disability was concerned, were of the kind against which the insurance company agreed to indemnify him, and that his disabilities were of a degree for which he would be entitled to recover. Grand Lodge, B. L. F. v. Orrell, 206 Ill. 208; Davis v. Midland Casualty Co., 190 Ill. App. 336; Missouri State Life Ins. Co. v. Conas, 255 Ill. App. 475; Wood v. Prudential Ins. Co., 271 Ill. App. 103; Aetna Life Ins. Co. v. Spencer, 32 S. W. (2nd) 310. So far as we are aware, it has not been held in any case that total disability within the meaning of a clause of the kind contained in this policy, means that the insured should be rendered entirely, absolutely and physically helpless in order to recover. We think also the accident was the sole cause of plaintiff's disability within the meaning of the policy.

A more serious question is raised by defendant's contention that plaintiff cannot recover because the policy by its terms exempts from indemnity injuries from accidents occurring while the insured is a passenger upon a street car, or similar conveyance, unless the accident results in the wrecking or disablement of the conveyance. The provisions of the policy provide in substance that the accident must result from "the wrecking or disablement" of any street railway car in which the insured is traveling as a fare-paying passenger. Under the general provisions of the policy, in much larger type than the body of the instrument, is the following

explanation:

"Under the provisions of this policy in which the company's liability is contingent upon a wrecking or disablement of a conveyance or vehicle such words are hereby defined to mean any damage to such conveyance or vehicle which results in the immediate stopping of said conveyance or vehicle and necessitates repairs thereto before such conveyance or vehicle can be safely operated again."

Plaintiff argues that the car was disabled within the meaning of this clause and says that the facts that the accident happened, that a window was broken, that the street car stopped immediately, that it did not proceed until the conductor had removed the broken parts so that other persons would not be injured, and that the street car while on this same run developed motor trouble, prove that the car was "disabled" within the meaning of the policy.

The rule that in case of ambiguity the construction must be in favor of the insured is reasonable, and one which this court has never hesitated to apply. However, in insurance as in other contracts, parties are still deemed in law free to insert such provisions as they may agree upon in case the same are not contrary to public policy or the statutes and laws of the State. It is true, when this policy is carefully considered that the word "insurance" as applied to it would seem to be a misnomer. However, the premium to be paid was very small, and an assured taking a policy where the amount of the premium is inconsequential ought hardly to expect to receive more than he pays for. But we cannot by construction pervert the provisions of this policy as here expressed in plain and unambiguous language. This car in which plaintiff was riding was neither wrecked nor disabled. Plaintiff's injury, therefore, is not within the indemnity provided by the policy. It is not urged that the finding of the court is against the weight of the evidence. However, as a matter of law, under the facts as proved, we think the trial court could not have made a different finding.

For the reasons indicated the judgment is affirmed.

AFFIRMED.

O'Connor and McGursly, JJ., concur.

[illegible][illegible][illegible]

neither wrecked nor dished. Kinnick's injury, he related, is
unambiguous. However, this car in which Kinnick was riding was
part the provisions of this policy as were returned in 1936 and
received more than 40 days lot. But no number of investigation was
amount of the vehicle is inconsequential and it is not to suggest to
to be held was very small, and no serious injury would have been
as applied to it would seem to be a financial, however, the grounds

trial court could not have made a different ruling. For the reasons stated the judgment is affirmed.

However, as a matter of law, when this case comes to the finding of the court is against the defendant. Not within the authority provided by the policy. It is not within.

72-0111-1/84

37154

THE NORTHERN TRUST COMPANY, a
Corporation, as Trustee under a
certain Insurance Trust Agreement
dated June 12, 1922,

Complainant,

vs.

MARGARET PHELAN et al.,
Defendants.

MARGARET PHELAN,
Appellant,

vs.

THE NORTHERN TRUST COMPANY, a
Corporation, as Executor and
Trustee under the Last Will of
Charles Phelan, dated June 15, 1930,
BERNICE E. SUTHERLAND,
CAROLINE VAN LENNEP,
GROVER M. HERMANN,
NEW YORK HOSPITAL,
Appellees.

APPEAL FROM CIRCUIT
COURT OF COOK COUNTY.

273 I.A. 624⁹

MR. JUSTICE McSUNELY DELIVERED THE OPINION OF THE COURT.

By this appeal there is presented the question, Which of two wills made by Charles Phelan shall control in the distribution of a trust estate created by his trust agreement? One of the wills was executed on June 12, 1922, the other on May 15, 1930; the latter was the last will prior to the death of the testator.

The Northern Trust Company, as trustee under the trust agreement, filed a bill asking for instructions; Margaret Phelan, wife of the decedent. The Northern Trust Company, as executor and trustee under the last will of Charles Phelan dated May 15, 1930, and certain beneficiaries named in the 1930 will, namely, the New York Hospital, Grover Hermann, Bernice Sutherland and Caroline Van Lennep, sister of decedent, were made defendants; answers were filed and replications thereto. The cause was referred to a master in chancery who heard testimony and reported; he recommended that the proceeds under the trust agreement should be paid over to The

27104

THE AMERICAN TRUST COMPANY, a
Corporation, as trustee under a
certain indenture dated June 12, 1932,
dated June 12, 1932,
Condition,

vi.

LANDMARK TRUST CO. of N. Y.
Defendant.

PLAINT IN EQUITY.

Against,

vii.

THE AMERICAN TRUST COMPANY, a
Corporation, as Trustee and
Trustee under the last will of
Charles Francis, dated June 12, 1932,
ERNEST E. BROOKLAND,
CAROLINE VAN LINDEN,
GROVER E. BROOKLAND,
NEW YORK HOSPITAL,
Applicants.

1. JUDICIAL NOTICE WILL BE TAKEN OF THE FACTS.

By this report there is presented the question, which of
two wills made by Charles Francis shall control in the distribution
of a trust estate created by his last will and testament. One of the wills
was executed on June 12, 1932. The other on May 12, 1932; the latter
was the last will filed in the court in New York.

The plaintiff Trust Company, as trustee under the first
will, filed a bill seeking the enforcement of said will; the
file of the second. The defendant Trust Company, as trustee
and trustee under the last will of Charles Francis dated May 12,
1932, and certain beneficiaries named in the last will, namely, the
New York Hospital, Grover Edmund, Caroline Brookland and Caroline
Van Linden, filed a bill of defense, with cross-petition; whereby said
first and defendant Trust Company. The latter was referred to a master
in chancery who heard testimony and reported; on recommendation that
the proceeds under the first will should be paid over to the

NEW YORK COUNTY COURT
IN EQUITY

1932 A 1878

Northern Trust Company, trustee, under the residuary clause of the will of Charles Phelan dated May 15, 1930, and should be disposed of, administered and distributed as therein provided. Objections and exceptions were filed to the master's report, and after hearing the Chancellor entered a decree overruling the exceptions and approving the report and decreeing that the proceeds of the trust should be disposed of under the terms of the will of Charles Phelan dated May 15, 1930. From this decree Margaret Phelan has appealed.

June 12, 1922, Charles Phelan entered into a trust agreement whereby he appointed the Northern Trust Company trustee of numerous life insurance policies aggregating approximately \$132,500; the trustee agreed, upon the death of Phelan to collect the proceeds of the policies together with any other policies that thereafter might be added, and after deducting its reasonable compensation to pay and transfer the net balance of such proceeds to itself, as trustee under the residuary clause of the last will and testament of Phelan, to hold the same in trust for Margaret Phelan, the wife, "and her appointees, subject to all of the provisions of the last will and testament" of Phelan. The agreement further recited that Phelan reserved the right of revoking this agreement either in whole or in part, "or of changing any or all of its terms by subsequent modification of the same in writing."

On the same date, June 12, 1922, Phelan made and executed his last will and testament wherein The Northern Trust Company was appointed executor and trustee under the will. This, among other things, provided for a bequest of \$10,000 to his wife Margaret Phelan, and devised the residue of his estate to The Northern Trust Company, as trustee, with directions to pay to Margaret Phelan the sum of \$20,000 a year, subject, under certain conditions, to be

reduced to \$12,000 a year, the remainder upon her death to be "held and distributed as she may direct in and by her last will and testament."

April 9, 1930, Phelan executed a codicil to his will of 1922. The substance of this codicil is not material to the present question.

April 29, 1930, Phelan wrote to his attorneys directing them to prepare another codicil to his will of 1922, which codicil should provide, among other things, for the elimination of the provision in the will of 1922 for the disposition of the remainder of the estate by his wife, and that the codicil should provide "so that my will would govern instead of Mrs. Phelan;" also that the codicil should provide for four cash legacies of \$5000 each to be paid to certain named persons, and also certain annuities to his sister and to a friend for life. The letter repeated the request to change his will of 1922 so that his will should control the disposition of the remainder, instead of the will of his wife; also it requested that the codicil should provide that payments by the Trust Company to her should cease at her death.

When Phelan's attorneys received this communication they replied, suggesting the advisability of drafting a new will instead of a second codicil to the 1922 will, for the reason that the will, with two codicils, would produce an involved set of documents with different sets of witnesses. This suggestion was approved by Phelan, and Mr. Gordon, his attorney, prepared a new will which was executed by Phelan on May 15, 1930, and which will was probated after his death. This will was delivered to The Northern Trust Company, which returned to Phelan the will of 1922 with the suggestion that it be destroyed. A counterpart of the 1922 trust agreement and a carbon copy of the 1922 will were found in Phelan's strong box after his death; the original will of 1922 was not found among his papers.

reduced to \$1,000 a year. The remainder upon her death to be paid
and distributed as she may direct in and by her last will and testa-
ment."

April 9, 1930, Thelen executed a codicil to his will of 1927.

The substance of this codicil is that certain of the property in-
cluded.

April 22, 1930, Thelen wrote to his attorney, Mr. [Name],
to prepare another codicil to his will in which, among other things,
provide, among other things, for the elimination of the provision in
the will of 1927 for the election of one trustee of the estate
by his will, and that the codicil should provide two trustees by will
would serve instead of Mrs. Thelen; also that the codicil should
provide for four cash legacies of \$5000 each to be paid to certain
named persons, and also certain amounts to his sister and to a
friend for life. The letter requested the attorney to prepare the will
of 1927 so that his will should control the disposition of the es-
tate, instead of the will of his wife; also it requested that the
codicil should provide that payment by the first trustee to her
should cease at her death.

When Thelen's attorney received this communication may re-
plied, suggesting the advisability of drafting a new will instead of
a second codicil to the 1927 will, for the reason that the will, with
two codicils, would produce an involved set of documents and that the
first set of documents. This suggestion was accepted by Thelen,
and Mr. [Name], his attorney, prepared a new will which was executed
by Thelen on May 12, 1930, and which will was produced after his
death. This will was delivered to the Western Trust Company, which
returned to Thelen the will of 1927 with the suggestion that it be
destroyed. A certificate of the 1927 trust agreement was a carbon
copy of the 1927 will were found in Thelen's papers and after his
death; the original will of 1927 was not found among his papers.

The will of 1930 increased the bequest to his wife from \$10,000, as provided in the will of 1922, to \$20,000. The 1922 will gave the wife an annuity of \$20,000; the will of 1930 gave her \$24,000 per annum for the first five years, \$18,000 for the next five years, and \$12,000 per annum for the remainder of her life; it also provided for the legacies and annuities mentioned in Phelan's letter to his attorneys.

Phelan died August 13, 1931. At this time The Northern Trust Company, trustee under the insurance trust, had collected the sum of \$227,263.06 as the proceeds of all the insurance policies payable to and deposited with it, as trustee.

Phelan was also insured under policies not included in the insurance trust agreement of 1922, which were made payable to his executor, in the principal amount of \$90,000, upon which his estate has realized the sum of \$71,863.30. The estate, exclusive of the trust estate, inventoried at \$160,273.

We hold that the chancellor correctly found that the proceeds held by The Northern Trust Company, as trustee under the insurance trust, should, under the residuary clause of the will of May 15, 1930, be held and disposed of upon the terms, trust and conditions set forth in that will.

The insurance trust agreement created an estate to be distributed as Mr. Phelan directed in the agreement, but subject to his "last will and testament," and to his right to revoke, change or modify any of the terms of the agreement. At this time the will of 1922 would control, but he reserved the right to change his will, which, however, he might do even without such reservation.

That it was subsequently the intention of Phelan to change the method of distribution of his estate is conclusively shown by the evidence. In April, 1930, Phelan wrote to his lawyers requesting that a codicil be made to the 1922 will; by his communication he

The will of 1930 increased the bequest to his wife from \$10,000, as provided in the will of 1925, to \$25,000. The 1930 will gave the wife an annuity of \$5,000; the will of 1935 gave her \$24,000 per annum for the first five years, \$25,000 for the next five years, and \$12,000 per annum for the remainder of her life; it also provided for the legacies and annuities mentioned in Nathan's letter to his executor.

Nathan died August 11, 1931. At this time the Northern Trust Company, trustees under the insurance trust, had received the sum of \$27,483.66 as the proceeds of all the insurance policies payable to and deposited with it, as trustee.

Nathan was also insured under policies not included in the insurance trust agreement of 1925, which were made payable to his executor, in the principal amount of \$50,000, some of which his estate has realized the sum of \$71,823.70. The estate, executor of the trust estate, invested at \$150,000.

We hold that the executor correctly found that the proceeds held by the Northern Trust Company, as trustee under the insurance trust, should, under the residuary clause of the will of May 15, 1910, be held and disposed of upon the income, trust and conditions set forth in that will.

The insurance trust agreement executed in relation to the 1925 will provided as Mr. Nathan directed in the agreement, but subject to his "last will and testament," and in his kind so revised, changed or modified any of the terms of the agreement. At issue is the will of 1935 which control, but he reserved the right to change his will, which, however, he did not do when it was executed.

That it was substantially the intention of Nathan to make the bequest of disposition of his estate in substantially similar to the will of 1910, 1925, Nathan wrote to his lawyers requesting that a codicil be made to the 1925 will; in his communication he

clearly indicated his intention to change the beneficiaries of his estate and to control the distribution of his estate himself, instead of through Mrs. Phelan's will.

Defendant argues that even if these changes had been incorporated in a codicil to the will of 1922, the original will would still control the distribution - that is, the insurance trust agreement and the will of 1922 constitute a binding agreement which could not be modified or altered in any way by Phelan. This would be contrary to the express right to make changes, reserved in the insurance trust agreement, and make meaningless the repeated language retaining such right.

Counsel for Mrs. Phelan rely largely on the decision in Padfield v. Padfield, 72 Ill. 322. In that case Thomas Padfield, in consideration of receiving \$2000 a year, agreed to make a will in favor of two children, which will was made at the same time; there was no reservation in the agreement of the right to change or modify it. It was held that the contract created a vested interest in the two children. When the same case was again before the Supreme court (78 Ill. 16) the court held that the contract passed title of the property and placed it beyond the reach of Thomas Padfield, as he did not reserve any interest in or control over it, and that it was evidently the intention of Thomas Padfield to give two-thirds of his property to his two children without reserving any right to change this disposition. In the instant case, as we have noted, Phelan reserved the right to revoke or change the trust, and this reservation cannot be ignored.

Although respective counsel have presented many points intended to show the variant results from distributing the proceeds under the will of 1922, and under the will of 1930, such considerations are not conclusive; but it should be noted that if Mrs. Phelan's contention is sustained, the provisions in the 1930 will for the two

annuitants and the remaindermen are nullified, for there would be nothing left for them.

It is a fair inference that Phelan physically destroyed the will of 1922. If there had not been found after his death a copy of this will, could anyone question the control of the will of 1930? The will of 1930, in law, destroyed the will of 1922. This will of 1930 is the only last will and testament. We cannot follow the argument which concedes that the will of 1930 revokes the will of 1922 and yet asserts that the will of 1922 is the only document which controls the distribution which Phelan attempted to control by the will of 1930. This would give the destroyed will more potency than that possessed by the will which destroyed it.

Counsel say that even though Phelan did reserve the right to change the trust, this right was never validly exercised, citing cases which hold that except the power is exercised it is a nullity. Harvard College v. Balch, 171 Ill. 275; Mayer v. Tucker, 102 N.J. Eq. 524. When the trust agreement provided that the distribution of the trust estate should be subject to Phelan's last will and testament, he defined the manner by which any change in distribution should be effected, namely, by his will. No modification of the language of the trust agreement itself was needed to effect such a change. The distribution was a flexible affair, at all times solely under the control of Phelan and to be determined by the provisions of his last will, whenever made.

The gist of the controversy is over the provision in the insurance trust agreement that the proceeds are for Mrs. Phelan "and her appointees." She evidently wishes to control the remainder of the estate, but, as we have said, the agreement does not provide that she shall have the unqualified and sole distribution.

The fundamental question presented is whether Phelan, with reference to the distribution of his estate, was ineluctably bound

annulment and the termination of the will, for it is not to be
 nothing left for them.

It is a fair inference that when a testator executes a
 will of 1921. If there had not been found in his pocket a copy
 of this will, could anyone question the validity of the will of 1921?
 The will of 1920, in fact, destroyed the will of 1921. This will
 of 1920 is the only last will and testament. It cannot follow the
 argument which concludes that the will of 1920 revokes the will of
 1921 and yet asserts that the will of 1921 is the only document
 which controls the distribution of the estate. It would be similar
 by the will of 1920. This would give and destroy the will
 potency then that possessed by the will which destroyed it.

Could any man even though he is a lawyer and a judge
 to change the facts, this right was never really established, being
 cases which hold that except the power is retained in a will.

Edward Collier v. Balch, 171 Ill. 477; 100 Ill. 477; 100 Ill. 477.

It is true that the testator provided that the distribution
 of the estate should be subject to the will of 1921 and
 testament, as defined the manner by which any change in distribution
 should be effected, solely, by his will. He provided that of the
 language of the trust agreement itself was stated to effect such a
 change. The distribution was a lifetime estate, as all these things
 under the control of the testator and to be determined by the provisions
 of his last will, whenever made.

The gist of the controversy is over the question of how
 the testator intended that the income and the principal should be
 "and her representatives." The validity thereof is subject to the condition
 of the estate, will, as we have said, the agreement does not provide
 that the will have the annulment and will distribution.

The fundamental question presented is whether or not, with
 reference to the distribution of the estate, was the testator's intent

by the terms of the documents executed in 1922. The documents themselves, and the circumstances, irresistibly lead to the conclusion that he was not.

We have not attempted to note the many points made in the respective briefs or to follow the order of the arguments presented. There is only one decisive question involved, as we have just stated

For the reasons indicated we hold that the decree of the chancellor is proper and it is affirmed.

AFFIRMED.

Matchett, F. J., and O'Connor, J., concur.

by the terms of the document executed in 1877. The document
themselves, and the circumstances, are entirely lost to the
attention that he was not.

We have not attempted to make the only mistake in the
respective parts of to follow the order of the original document.
There is only one legislative question involved, and it is a
for the reasons indicated we hold that the same is the
conclusion is proper and it is affirmed.

Attest.

Marshall, W. H., and O'Connor, J. J. concur.

36965

RICHARD L. WILLIAMS,
Defendant in Error,

vs.

FOREMAN-STATE TRUST AND SAVINGS
BANK, a Corporation, as Executor
of the Estate of Lucas R. Williams,
Deceased,

Plaintiff in Error.

ERROR TO THE CIRCUIT COURT
OF COOK COUNTY.

273 I.A. 625

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

July 6, 1931, Richard L. Williams filed his claim in the Probate court of Cook county against the estate of his father, Lucas R. Williams, deceased. The claim was disallowed and claimant appealed to the Circuit court where, after hearing by the court, the claim was allowed for \$5,460 as a claim of the 6th class, and the executor prosecutes this writ of error.

The claim was based on a promissory note dated July 23, 1919, for \$3,000 made by Lucas R. Williams, payable to the order of his son Richard L. Williams, and due at the date of the father's death. The note bore interest at 6 per cent per annum and the following endorsement: "This Three thousand dollars advanced to my daughter Edith W. Munger this day & said amount is to be deducted at my death from her share per terms of my will. Chicago July 23, 1919, Lucas R. Williams."

The defense was that the note was satisfied and released by a written agreement and a written release entered into between the parties dated January 13, 1927. Claimant's contention is that the note was not included in the agreement or ^{the} release but is still due and unpaid.

The question for decision is the construction of the agreement and release. Apparently both parties were of opinion that the agreement was ambiguous and therefore extrinsic evidence was admissible, and a written stipulation of facts was submitted on the

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WILLIAMS L. WILLIAMS, JR.

July 6, 1957, Williams L. Williams, Jr.

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hearing, together with other evidence from which it appears that Lucas R. Williams was a physician; that in 1902 and for many years prior thereto "he owned and managed various medical offices and business enterprises connected therewith, in diverse cities of the United States," and in that year turned the business over to his son Richard L. Williams, the claimant, who conducted the business until 1904, when Victor G. Williams, another son, joined Richard in the management and control of the business. It further appears from the evidence that from time to time Richard gave money to his father and his mother, Clara L. Williams; that Clara L. Williams died before the death of her husband, Lucas R. Williams, and her estate was being probated in the Probate court of Cook county. Disagreements arose between the parties and Edith W. Munger (the sister of Richard and Victor). After the death of Clara L. Williams, Edith W. Munger, her daughter, filed a petition in the Circuit court of Cook county to perpetuate the testimony of Lucas R. Williams, her father, who was in ill health and advanced in age, making her brothers Richard and Victor, and Lucas, her father, and others parties defendant.

Lucas R. Williams, the father, was dissatisfied with the way his sons Richard and Victor conducted his business, and filed a bill for an accounting against them in the Circuit court of Cook county. Edith W. Munger also filed a petition in the Probate court of Cook county in the matter of the estate of her mother, Clara L. Williams, deceased, seeking to revoke letters of administration which had theretofore been granted to her uncle, George J. Williams, on the petition of her brothers Richard and Victor.

On the petition to perpetuate testimony, the deposition of Lucas R. Williams was taken before a master in chancery September 28, 1926, at which time his son Richard was present. Lucas R. Williams there testified that his son Richard had been associated with him in business; that about 25 years ago Richard took over

the management of the business but there was no change in ownership; that there had never been an accounting of the income of the business; that Richard had paid him money, "but I gave him notes for all of it;" that from 1902 until Mrs. Williams died her income came from Richard, for which the witness gave Richard notes; that the notes aggregated over \$125,000; that in 1923 Mrs. Williams gave Richard a note for \$5,000; that in 1923 the father transferred real estate to Richard for which Richard was to cancel all of the witness's notes; that instead of Richard handing the witness the notes, Richard tore them up and threw them away; that he kept a record of the notes he had given Richard on a sheet of paper; that Richard had a copy of this list, which showed notes aggregating about \$125,000; that in 1924 he wrote his daughter Edith a letter giving her a list of the notes except the \$5,000 note given to Richard by his mother which was not included in the list; that "Since that time he (Richard) has not tried to collect any notes;" that Richard stated he had torn up all the notes at the time of the settlement; that he gave an automobile to his daughter Edith which he bought from his son Richard and for which he gave Richard a note for \$3,000. The letter just mentioned from the witness to his daughter Edith is attached to the deposition as an exhibit, in which he gives a list of the notes and says: "I might say right here that Mother informed me that one note for \$3,000.00 was not cancelled." At the time this deposition was taken Richard was present but on advice of counsel refused to testify on the ground that the proceeding was irregular and void. This deposition was filed in the office of the clerk of the Circuit court December 20, 1926.

The evidence further tends to show that shortly after this deposition was taken the parties, through their counsel, began negotiations with a view of settling their differences, which re-

the statement of the witness that there was no change in ownership;
that there has never been an assignment of the stock of the bank
made; that the bank had only one owner, and that the bank had
all of its stock owned by the bank; that the bank had
from 1880 to 1885, the bank had owned the bank; that the
notes registered over \$125,000; that in 1885 the bank
issued a note for \$5,000; that in 1885 the bank
real estate to Richard for which Richard was to receive all of the
witness's notes; that instead of Richard receiving the witness's
notes, Richard gave them up to the witness; that the witness
received of the notes he had given Richard as a check of money; that
Richard had a copy of this list, which showed other persons
about \$125,000; that in 1885 he wrote the witness a letter
giving him a list of the notes which the bank had given to
Richard by his mother which was not included in the list; that
"Richard told me (Richard) that he had given me a list of the
notes which Richard had given me all the notes in the list of the
witness; that he gave me a list of the notes which Richard had
he bought from the bank and Richard had received the same amount of notes
for \$5,000. The latter had received from the witness for his
daughter which is attached to the deposition of the witness, in
which he gives a list of the notes and says: "I think my wife
has not told Richard Richard was not told the \$5,000. I was not
included." At the time this deposition was taken Richard was
present and on cross-examination Richard admitted that he was present
and the deposition was taken and read. The deposition was
filed in the office of the clerk of the Circuit Court of the
City of St. Louis.

The witness further stated that when Richard was taken
deposition was taken the witness, Richard, was present, before
testimony with a list of notes which Richard had received, which was

sulted in the execution of the agreement and release of January 13, 1927, above mentioned.

The substance of the agreement is as follows:

"Whereas, there is now pending in the Circuit court of Cook county, Illinois, a certain proceeding to perpetuate testimony in which Edith W. Munger is plaintiff and Richard L. Williams, Victor G. Williams, Lucas R. Williams, and others, are defendants. And Whereas there is also pending in the Circuit court of Cook county, Illinois, an action in chancery for an accounting in which Lucas R. Williams is plaintiff and Richard L. Williams and Victor G. Williams are defendants, and

Whereas there is also pending in the Probate court of Cook county in the matter of the Estate of Clara L. Williams, deceased, *** the petition of Edith W. Munger to revoke the letters of administration granted by said court to George J. Williams on the petition of Richard L. Williams and Victor G. Williams, and

Whereas it is the desire of all parties interested in said controversies and proceedings to adjust and compromise the same and to effectuate an amicable administration of the estate of said Clara L. Williams, deceased."

The agreement then recites that in consideration of the mutual covenants and agreements and of the mutual releases to be executed by the parties they agree as follows: Richard shall pay Edith \$10,000 in cash and assign to Edith and Victor all of his interest in the estate of their mother, Clara L. Williams, deceased. Richard and Victor then disavow all claims as creditors against the estate of their mother and warrant that there is only one claim of \$150 against the mother's estate. (5) "Richard L. Williams and Victor G. Williams disavow and release all claims of any kind whatsoever against Lucas R. Williams from the beginning of time to the time hereof, and particularly agree and covenant with Lucas

...in the execution of the ... of ...
... 18, 1937, above mentioned.
The substance of the ... is as follows:
"Whereas, there is now pending in the ... Court of
Cook County, Illinois, a certain ... to ...
... in which said ... is ... and ...
... Victor E. Williams, ... and ...
... and ... there is also pending in the ... Court of Cook
County in the matter of the ... of ...
... the petition of said ... to ...
... granted by said ... to ...
... of Richard E. Williams and Victor E. Williams, ...
... it is the desire of all parties interested in this
controversy and proceeding to ... and ...
to eliminate an ... of the ...
I, Williams, do hereby ...
The agreement herein ... is ...
... and ... to ...
... by the parties ... as follows: ...
... in each and ... to ...
... in the matter of their ...
... and Victor ... all ...
... of their ... and ...
... the mother's ... (b) ...
Victor E. Williams ... and ...
... against ... from the ...
... and ... with ...

R. Williams and Edith W. Munger that they will never assert any claim in or to any part of the trust estate established by Lucas R. Williams, November 8, 1924." The agreement then provides that Edith W. Munger agrees to dismise her suit to perpetuate the testimony; that Lucas R. Williams agrees to dismiss his suit for an accounting and that the State Bank of Chicago shall be appointed administrator of the estate of Clara L. Williams, deceased, in lieu of George J. Williams. Richard, Victor and Edith then agree that their joint right to enter the safety deposit box formerly kept by their mother shall be turned over to the State Bank of Chicago; that

"(11) The parties hereto agree to execute forthwith all necessary releases, stipulations and other documents to carry out the terms of this agreement." And by paragraph (12) Edith and her father, Lucas R. Williams, release Richard and Victor "from the beginning of time and forever after from all of the claims by them asserted in said suits and from any and all other claims, debts and obligations whatsoever and will save and keep harmless the said Richard L. Williams and Victor C. Williams of and from any and all claims of whatever nature and character that may be made by the administrator or executor of the estate of Clara L. Williams, deceased." The agreement was signed by the four parties, Richard, Victor, Lucas and Edith. At the same time the parties executed releases. The one executed by Richard and Victor recited that in consideration of \$1.00 paid by Lucas and Edith, "and in consideration of the settlement of certain actions, controversies, claims and counter-claims heretofore existing between the said parties, and in consideration of the releases of said Lucas R. Williams and said Edith W. Munger executed contemporaneously herewith in favor of the undersigned, do hereby remise, release and forever discharge the said Lucas R. Williams and the said Edith W. Munger, their

heirs, executors and administrators, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, trespasses, damages, claims and demands, whatsoever in law or in equity which against the said Lucas R. Williams and the said Edith W. Munger we, Richard L. Williams and Victor C. Williams, ever had, now have, or which our heirs, executors and administrators hereafter can or may have by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of this release." Then follows a provision by which Richard and Victor particularly release all claims against any funds entrusted by Lucas to the State Bank of Chicago according to a trust agreement dated November 8, 1924, and made by Lucas and that they would never attack the validity of such trust.

It was further stipulated that at the same time Lucas and Edith executed a release, the same in substance as the release just mentioned, releasing Richard and Victor from all claims and that after the execution of the agreement and of the release the proceedings in the Circuit court to perpetuate testimony and the bill for an accounting were dismissed, and the State Bank of Chicago appointed administrator of the estate of Clara L. Williams, deceased, in lieu of George J. Williams, and that the dismissal of the proceedings to perpetuate testimony provided that the testimony taken in that case should be "withdrawn and held for naught."

By the written stipulation it was further agreed that the last will and testament of Lucas R. Williams, which was executed January 20, 1927, made no devise or bequest to Edith W. Munger; that Lucas was of sound mind and understood ordinary business transactions at the time of the execution of the various papers above mentioned, and that on January 13, 1927, the time of the

execution of the agreement and of the release, Richard L. Williams, the claimant, "had no claim against Lucas R. Williams or his estate, except upon the note upon which the claim here is based." The written stipulation further provided that any party could object to any of the facts stipulated on the ground of incompetency or immateriality.

By agreement the transcript of the testimony given by Isaac E. Ferguson, attorney for Lucas and Edith, on the hearing of the claim in the Probate court, was read, from which it appears that the deposition of Lucas, above referred to, was taken prior to the time of the execution of the agreement and of the releases. He further testified as to the negotiations leading up to, and of the preparation and execution of, the agreement and releases; that he had heard of notes executed by Lucas to Richard but not of the specific note in question. Upon objection, the court excluded the deposition of Lucas R. Williams. Some time after the case was closed, and considerable argument had been indulged in by counsel, counsel for claimant offered to prove by Victor G. Williams that in September, 1923, when there had been a settlement between the father and Richard in regard to the various notes of the father above mentioned, and when Richard delivered the notes to the father or tore them up, the note in question was handed to the father who returned it to Richard, saying he would not give Richard any credit for that note because it was not to be paid except from his estate. This evidence was objected to and the objection sustained on the ground that the settlement of 1923 was not in issue; that the only matter before the court was the question of the settlement evidenced by the agreement and release of 1927.

Counsel for claimant contends that the release was merely "an offshoot or outgrowth of the original agreement" and must be governed by what was said in the agreement; that "It is clear that

this note was not included or intended to be included in the terms of the agreement." And that in construing agreements of parties it is the law that where the agreement begins with a particular statement of the matters to be settled and the manner of their settlement, and these are followed by general words of release, the general words of release are limited and restrained by the particular recitals, and that in the instant case the recitals in the agreement are (1) that there was pending in the Circuit court of Cook county a proceeding to perpetuate testimony brought by Edith against Richard, Victor, and others; (2) that there was pending in the Circuit court of Cook county a bill in chancery for an accounting brought by the father against his two sons; (3) that there was also pending in the Probate court of Cook county in the matter of the estate of Clara L. Williams, deceased, a petition to revoke the letters of administration; and (4) that it was the desire of all parties interested in such controversies and proceedings to adjust and compromise them and to effectuate amicable administration of the estate of Clara L. Williams, deceased, and it is argued that the several agreements following these recitals must be construed as limited to those recitals, and that none of the recitals in any way refer to the note in suit.

While the rule of construction is as stated by counsel, in a proper case, such rule is never applied when the meaning of the agreement or contract is plain and unambiguous. And we think the rule is inapt here because it is obvious that the parties intended not only to dispose of the three matters pending in court, but also other matters enumerated in the agreement. The agreement provided that Richard should pay Edith \$10,000 cash, assign to Edith and Victor all of his interest in the estate of Clara; that he and Victor disavowed all claims they might have against Clara's estate; that he and Victor "release all claims of any kind whatsoever against Lucas R. Williams from the beginning of time to the time

[illegible]

hereof." The agreement further provided that Edith and Lucas should release all claims they had against Richard and Victor "from the beginning of time," and that the parties should execute releases to the others. The releases were accordingly executed. The one executed by Richard and Victor to Lucas and Edith released and discharged forever all claims they might have against Lucas and Edith, "their heirs, executors and administrators, of and from all and all manner of action," etc.

We think it clear by a reading of the agreement that Richard and Victor released Lucas, his executors, administrators and assigns from all claims in consideration of general releases to be executed by Lucas and Edith and in further consideration of the dismissal of the three matters pending in court. If the release executed by Richard and Victor did not include the note in suit, then Richard gave up nothing because it was stipulated that he had no other claim against Lucas prior to the execution of the agreement.

Moreover, we think the agreement must be held to have included the note in question for the reason that it appears that four months before the agreement was executed Lucas, the father, testified concerning a \$3000 note given by him to Richard which he claimed should have been cancelled in 1923; and in these circumstances it would have been contrary to all human conduct to say that when the agreement was executed in January, 1927, the note was not released. And the fact that it was not payable except from the estate of Lucas after his death would not change the situation. We think the claim should have been disallowed, and therefore the judgment of the Circuit court of Cook county will be reversed with a finding of fact.

JUDGMENT REVERSED WITH A FINDING OF FACT.

Matchett, P. J., and McCurely, J., concur.

(See next page.)

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FINDING OF FACT.

To find as a fact that the \$3000 note involved was included in the agreement and release executed January 13, 1927.

THE NEW YORK PUBLIC LIBRARY
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37041

CLINE C. BROSIUS, for the Use of
CHARLES W. LAMBORN and CHARLES
E. HICKLER,

Appellee,

vs.

JOHN P. STEPHANY,

Appellant.

129 7
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 625²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Cline C. Brosius, a practicing lawyer, brought suit against the defendant to recover \$1,003.61 which he claimed was due him for legal services. The defendant denied liability, there was a jury trial, and a verdict and judgment in plaintiff's favor for \$280, and defendant appeals.

The evidence is to the effect that plaintiff owned an apartment building in Chicago which was in his wife's name; that it was encumbered by three mortgages, one for \$85,000, a second for about \$65,000, and a third for about \$5,000, all of which were in default; that the defendant, who owned some of the bonds secured by the first mortgage and also a part of the bonds secured by the second mortgage, had filed a suit for a partial foreclosure of the first mortgage, and in this way the parties became acquainted; that in February, 1930, the parties orally agreed that if Brosius would not delay the foreclosure suit defendant would give him an additional 15 months within which to redeem the property from the decree of foreclosure, and that thereupon Brosius agreed to render legal services for defendant without charge.

The evidence further shows that shortly thereafter plaintiff began to render legal services for defendant and continued to do so in a number of matters until about June, 1931. Brosius' version of the matter was that about July, 1931, he asked Stephany to execute an option in writing authorizing plaintiff to redeem the property

CLINTON F. BROOKS, for the use of
CLINTON F. BROOKS and DEWITT
M. BROOKS,

Appellant,

vs.

JOHN P. WEINBERG,
Appellant.

AM. JUSTICE'S COMMONS DIVISION THE ORDER OF THE COURT.

CLINTON F. BROOKS, a practicing lawyer, deceased, and his estate
the defendant to recover \$1,000.00 which he claimed was due him for
legal services. The defendant denied liability. There was a jury
trial, and a verdict and judgment in plaintiff's favor for \$200.
and defendant appeals.

The evidence is as follows: Plaintiff owned an apartment
next building in Chicago which was in his wife's name; that it was
encumbered by three mortgages, and for \$100,000, a second for about
\$25,000, and a third for about \$2,000, all of which were in default;
that the defendant, who owned some of the funds secured by the first
mortgage and also a part of the funds secured by the second mort-
gage, had filed a suit for a partial redemption of the first mort-
gage, and in this way the parties became acquainted; that in
February, 1935, the parties orally agreed that if plaintiff would
delay the foreclosure with defendant would give him an additional 10
months within which to redeem the property from the first of fore-
closure, and that defendant Brooks agreed to tender legal services
for defendant without charge.

The evidence further shows that shortly thereafter plaintiff
began to render legal services for defendant and continued to do so
in a number of matters until about June, 1935. Brooks' version of
the matter was that about July, 1935, he asked defendant to execute
an option in writing authorizing plaintiff to redeem the property

within the time orally agreed upon in February, 1930, but that Stephany refused to do so.

There is no dispute in the evidence that it was orally agreed by the parties that Brosius could have an extra 15 months to redeem the property after foreclosure; nor is there any dispute that Brosius agreed to perform legal services for defendant without charge, and that he did render such services for approximately a year and a half. But the evidence is in conflict as to whether defendant refused to give the option to plaintiff to redeem the property as agreed. Plaintiff's testimony is to the effect that defendant refused to execute a written agreement and that the oral one was invalid because it involved real estate and was not to be performed within a year. On the other hand, defendant's testimony is to the effect that he was not asked for any written agreement until July, 1931. On the trial defendant testified that he was still willing to turn the property back to plaintiff if plaintiff would pay the indebtedness against it.

Plaintiff testified in detail as to the services he had performed and also that when he rendered his first services he made a written memorandum of them and continued to do so in every case; that they were reasonably worth more than \$1,000. He called two attorneys as witnesses who gave their opinion that the reasonable charge for the services rendered was more than \$900.

Defendant contends that the court erred in admitting improper evidence on the part of plaintiff. The evidence shows that July 28, 1931, plaintiff made out a number of bills detailing the services rendered by him, and sent them to defendant. Prior to the trial plaintiff served notice on defendant to produce these bills and defendant did so. Plaintiff offered them in evidence and they were received over defendant's objection. We think this was error. They should have been excluded because plaintiff had testified in detail

within the time fully agreed upon in February, 1931, but was

temporarily released to do so.

There is no dispute in the evidence that it was fully agreed

by the parties that Plaintiff would have to return to Plaintiff's

the property after termination; but it is not in dispute that Plaintiff

agreed to perform legal services for Plaintiff's estate, and

that he did render such services for Plaintiff's estate, and

that the evidence is in conflict as to whether Plaintiff's estate

gave the option to Plaintiff to return the property to Plaintiff.

Plaintiff's testimony is to the effect that Plaintiff's estate

executed a written agreement and that the oral one was invalid, but

because it involved real estate and was not to be performed within a

year. On the other hand, Defendant's testimony is to the effect

that he was not asked for any written agreement until July, 1931.

On the trial Defendant testified that he was still willing to turn

the property back to Plaintiff if Plaintiff would pay the balance

owed against it.

Plaintiff testified in detail as to the services he had per-

formed and also that when he rendered his legal services he made a

written memorandum of same and returned it to the party who

last they were reasonably well known to him. He called two

attorneys as witnesses who gave their opinion that the memorandum

executed for the services rendered was not valid.

Defendant's contention that the money given to Plaintiff in respect

evidence on the part of Plaintiff. The evidence shows that July 26,

1931, Plaintiff made out a number of bills detailing the services

rendered by him, and sent them to Defendant. Later on the trial

Plaintiff advised that he had been in contact with some bills and that

Defendant did so. Plaintiff advised that he had been in contact with some bills and that

received over Defendant's objection. He claims this was error. They

should have been returned because Plaintiff had testified in detail

to the services he rendered and it was improper to supplement or to corroborate his testimony by presenting the bills which he had rendered defendant. There was no dispute but that defendant received the bills; but we are unable to say that they prejudicially affected the defendant, in view of all the evidence in the record, and the fact that the verdict was for less than one-third of the amount plaintiff was claiming.

Defendant also contends that the court erred in permitting evidence in reference to \$5,000 collected by the receiver as rent from the premises during the foreclosure proceeding, \$4000 of which was turned over by order of court in the foreclosure suit on a partial payment of the first mortgage. There was some evidence to the effect that this money belonged to plaintiff, the property having been sold at foreclosure sale for the amount of the decree, and that the effect of this was that plaintiff gave defendant \$4000 of this money which he could have kept for himself. We think this evidence should not have been admitted because plaintiff was suing for legal services rendered, substantially none of which were rendered in connection with the \$5000 in the receiver's hands.

But the issue was simple and was clearly understood by the jury. The court then instructed them that if they believed from a preponderance of the evidence that plaintiff agreed to perform legal services for defendant without charge, in consideration of which defendant agreed to give Erosius an option to redeem the property after the legal period of redemption had expired, and if they should further find from the evidence that plaintiff fully performed his agreement and defendant refused to carry out the agreement, then plaintiff was entitled to receive compensation for the services performed by him.

No complaint is made to the instructions and we think it obvious that the jury were not influenced to the prejudice of the

[illegible]

The defendant also contends that she would never be permitted
evidence in reference to \$8,000 collected by the receiver as was
from the proceeds during the receivership proceedings, none of which
was turned over by order of court in the receivership suit or a pay-
ment of the first mortgage. There has been evidence in the
effect that this money belonged to plaintiff, her property having
been sold at foreclosure sale for the amount of the debt, and that
the effect of this was that plaintiff gave defendant some of this
money which he could have kept for himself. In view of this evidence
should not have been admitted because plaintiff was suing for legal
services rendered, especially since all other suits referred to con-

The court has concluded that there is no evidence that the defendant was involved in the conspiracy.

no complaint is made to the investigators and we think it
evident that the fact was not intended to the protection of the

defendant on account of the admission of the evidence complained of. We are also of opinion that the further contention of defendant that he was unduly limited in cross examination of plaintiff in connection with the defense set up in the affidavit of merits, was not reversibly erroneous. This defense was, that part of the consideration for the making of the contract for the redemption of the property, as above mentioned, was that defendant agreed to appraise real estate for plaintiff, and part of plaintiff's claim was for consultations in reference to these matters and not for services rendered by plaintiff for defendant. While the ruling of the court might not be strictly accurate, yet defendant offered no evidence in his own behalf that would tend to support his defense above mentioned, although defendant did testify that many of the consultations had with plaintiff were concerning plaintiff's business.

While, as indicated, the record is not free from error, and if the questions involved were complicated or doubtful they might warrant a reversal, yet the issue in the instant case was simple and easily understood by the jury. Plaintiff did not receive one-third of what he was claiming, and as said in the case of Lyons v. Kanter, 285 Ill., 336, where substantial justice has been done the judgment ought not be reversed to enable the parties to make up a more perfect record.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

37082

THE GOMBERG COMPANY, an
Illinois Corporation,
Appellee,

vs.

JULIUS M. KAHN,
Appellant.

110 H
APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

273 I.A. 625³

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendant to recover \$264.03, claimed to be due it for services performed for defendant in securing a reduction of the taxes levied against the defendant's real estate in Chicago. There was a trial before the court without a jury, a finding and judgment in plaintiff's favor for the amount of its claim, and defendant appeals.

The record discloses that Jacob Gomberg was a real estate appraiser and president of plaintiff corporation, and that about May, 1930, he called on defendant at the latter's office with a view of endeavoring to reduce the taxes levied against an apartment building belonging to defendant known as Number 5465-73 Englewood avenue, Chicago. The evidence further shows that at that time Gomberg stated he thought the property was assessed too high and that he could obtain a reduction of the taxes, and it was agreed that defendant pay plaintiff \$85, and that if plaintiff obtained a reduction it would charge one-half of the amount of the reduction and would apply the \$85 in reduction of the one-half of the amount saved; that if there was no reduction, plaintiff would retain the \$85.

Afterward plaintiff had an appraisal of the building made, appeared before the Board of Review, and after a hearing the valuation placed on the building for assessment purposes was reduced \$10,357, so that there was a saving of \$698.06. Plaintiff claimed

THE UNITED STATES OF AMERICA
Illinois Department of Corrections
JULIUS W. KAHN
vs.
JULIUS W. KAHN
Appellee.

2731A.625

MR. JUSTICE DICKSON delivered the opinion of the court.

Plaintiff brought an action against the defendant to recover \$204.03, claimed to be due for services performed for defendant in connection with the construction of the new prison building at Joliet, Illinois. Plaintiff's complaint set forth that he was a carpenter and was employed by defendant at Joliet, Illinois, from January 1, 1935, to January 1, 1936. During that time he worked on the new prison building and was paid for his services at the rate of \$1.00 per hour. Plaintiff claimed that he was owed \$204.03 for his services. Defendant denied that it owed plaintiff any money and claimed that plaintiff was not entitled to the money claimed. The court found in favor of the plaintiff and awarded him the sum of \$204.03 with interest.

Plaintiff's complaint was filed on January 1, 1936. Defendant answered the complaint on January 15, 1936. The court held a trial on January 20, 1936. The jury found in favor of the plaintiff and awarded him the sum of \$204.03 with interest. The court affirmed the jury's verdict.

one-half of this or \$349.03, from which it deducted the \$85, leaving a balance claimed to be due of \$264.03. There was no dispute of the facts and defendant put in no evidence but his sole contention is that his agreement for the reduction of the taxes was with Jacob Gomberg and not with plaintiff corporation.

Gomberg gave testimony to the effect that he did the work and further testified that he entered into the agreement with defendant, but it is clear that he spoke of himself as being the corporation because he said "I was incorporated in 1930 and appeared before the board of review the latter part of 1931 in this case;" that the corporation was formed "prior to the time I actually did the work." It is true the evidence shows that defendant, who was an attorney at law, dictated a letter on his letterhead embodying the terms of the agreement, which is signed by Jacob Gomberg, and the letter is to the effect that Gomberg personally agreed to do the work. But it appears, as stated, that Gomberg often referred to himself as the corporation.

The court might well find that the agreement was made with the corporation and that it did the work. Of course it must act through individuals, and although the work was actually done by Gomberg, he was acting on behalf of the corporation.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

one-half of this or \$310.00, from when it became due and payable, and a balance claimed to be due of \$310.00. That was the substance of the facts and defendant put in no evidence but the jury found in favor of the plaintiff for the recovery of the sum of \$310.00 and costs.

Defendant gave testimony to the effect that he had with and later recalled that he stated that the agreement was not intended, but it is clear that he made it himself as being the corporation because he said "I was incorporated in 1900 and operating before the board of review the first year of 1901 in this case;" that the corporation was formed prior to the time I actually did the work. It is true the evidence shows that defendant, who was an attorney at law, dictated a letter on his letterhead containing the terms of the agreement, which is signed by Jacob Gombert, and the letter is to the effect that Gombert personally agreed to do the work. But it appears, as stated, that another letter referred to himself as the corporation.

The court might well find that the agreement was made with the corporation and that is all the work. Of course it might find through individuals, and if that is the case it would be by contract, he was acting as agent of the corporation. The judgment of the circuit court at Chicago is affirmed.

Reversed, 7-1, and remanded, 7-2, en banc.

37091

F. A. BOSCO,
Appellee,

vs.

MACIEJ NOGA and STANLEY NOGA,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

273 I.A. 625⁴

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against the defendants to recover damages claimed to have been sustained by reason of an automobile collision through the negligence of defendants, causing damage to plaintiff's automobile. Defendants filed an affidavit of merits in which they denied liability and averred that the damage sustained by plaintiff, as a result of the collision, was repaired to plaintiff's complete satisfaction, and that plaintiff, in consideration of the repairs, released defendants from all liability. There was a trial before the court without a jury and a finding and judgment in plaintiff's favor for \$200 and defendants appeal. Defendants took leave to file bond and bill of exceptions. The bond was filed and approved but they did not file a bill of exceptions.

The only contention made by defendants why the judgment should be reversed is that plaintiff's statement of claim did not state a cause of action. It is a late date to make such a point in this court, because for many years this court had held that in actions of the fourth class, after the case has been tried the case is what the evidence makes it, and we are not interested in the pleadings. In this we are, of course, following the Supreme court. In 1909, which was a few years after the Municipal Court Act was passed, the Supreme Court, in Edgerton v. C. R. I. & P. Ry. Co., 240 Ill., 311, held that in cases of the fourth class,

where no written pleadings were required, if it appeared on the whole record that the plaintiff was entitled to recover, and the court had jurisdiction, the judgment would not be disturbed on account of any insufficiency in pleading. The court there said (p. 313): "As to this class of cases under the Municipal Court act, where no written pleadings are required, the same rule will govern as controls the form of actions before justices of the peace. We have held that 'it is the well settled practice that in such courts (i. e., where written pleadings are not required), the party suing need not even name his action, or if misnamed, that will not affect his rights, if upon hearing the evidence he appears to be entitled to recover and the court has jurisdiction of the defendant and of the subject matter.'" The rule announced in the Edgerton case was followed and applied by this court in Detmer Woolen Co. v. Dixon Transfer Co., 167 Ill. App. 408; McGlunn v. Gillespie, 227 Ill. App. 400, and numerous other cases. And in Braner v. Grand Trunk Western Ry. Co., 319 Ill. 421, the rule was adhered to. In that case the court said (p. 425): "Defendant insists that the suit was in contract against joint defendants, and the judgment should have been against both defendants or neither. This contention the Appellate court held was not tenable as the action was of the fourth class to recover damages for negligence and may be treated as in tort. No written pleadings are required, and the rules applicable are the same as govern actions before justices of the peace. That holding is in accordance with Edgerton v. Chicago, Rock Island and Pacific Railway Co., 240 Ill. 311."

In view of the holdings of the Supreme court and of this court there is no merit in this appeal and the judgment of the Municipal court is affirmed.

AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

where no written findings were required, it is assumed on the
basis of the fact that the district was not a court, and that
court and jurisdiction, and therefore could not be exercised on the
basis of my jurisdiction in this case. The court is not a
court. (p. 113) "As is well known to every one who has studied the law,
where no written findings are required, the same rule will govern
as controls the fact of action before the court. The
fact that it is the only judicial proceeding and is a court
(i. e., where written findings are not required), does not mean
that it is even more a court, or if it is, it will not affect
the rights, it being bearing the same as a court in all respects
to preserve and the court has jurisdiction of all matters and of the
subject matter." The rule announced in the United States v. ...
... and applied to this case is United States v. ...
... 187 U.S. 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

37100

JOHN A. TESSNER and SOPHIE TESSNER,
Appellees,

vs.

L. F. EYENHUT & CO., Inc., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

273 I.A. 626¹

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action against defendant to recover \$300 claimed to have been deposited by them with defendant under the terms of a written contract entered into between the plaintiffs and Joe Duda and Anna Duda, his wife, for the exchange of two parcels of real estate. In their statement of claim plaintiffs allege that they deposited the money with defendant to be used for the payment of the 1929 taxes on property at 2419 North Long avenue, Chicago, and which the Dudas, under the terms of the contract, were to convey to plaintiffs; that defendant failed to pay the 1929 taxes, but claimed to have applied the money to redeem the property from tax sales for failure to pay certain special assessments on the property.

Defendant filed an affidavit of merits denying liability and set up that November 9, 1931, plaintiffs and the Dudas entered into a contract for the exchange of real estate whereby plaintiffs were to convey to the Dudas property known as 2311 North Lawler avenue, and the Dudas were to convey to plaintiffs property known as 2419 North Long avenue, Chicago; that the written contract executed by the parties provided that the Dudas had given to the defendant \$300 as earnest money which defendant was to hold together with the contract, and that when the deal was closed defendant was to pay the \$300 to the Dudas; that under the contract plaintiffs were required to execute their promissory note for \$500, secured by trust deed on the property at 2419 North Long avenue, which was part of the consideration to be paid the Dudas for the exchange of the properties; that afterward, when the deal was closed, December 10, 1931, the

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defendant disbursed the \$300 in accordance with the terms of the contract and with the approval and consent of plaintiffs and the Dudas. The affidavit of merits further set up that plaintiffs had failed to pay the \$500 note. There was a trial before the court without a jury and a finding and judgment in plaintiffs' favor for \$208.50, and defendant appeals.

The record discloses that L. W. Zygmunt, a lawyer practicing in Chicago for 18 years, was president of the defendant company. Zygmunt represented plaintiffs, who were exchanging a five room bungalow with the Dudas for a seven room bungalow. The contract for the exchange was prepared in defendant's place of business and is not as specific and clear as it should be. The contract provided as to each of the bungalows, that the "1930-1931 bill for General Taxes to be pre rated on basis of 1929 Tax bill."

The bungalow conveyed by the Lessners to the Dudas was to be conveyed subject to a first mortgage of \$4000 and a second mortgage of \$750; and the bungalow conveyed by the Dudas to the Lessners was subject to a first mortgage of \$4000 and a second mortgage of \$2000, and it was specified that the conveyances be made subject to no special assessments.

The evidence in the record is confusing and it is not surprising that the learned trial Judge could not grasp the facts; upon a reading of the record of the trial it is obvious that counsel on neither side had the facts so in mind that they could be intelligently presented. There is evidence in the record, however, that defendant disbursed nearly all the \$300 in clearing the property at 2419 North Long avenue of liens of special assessments, and that plaintiff had made but three monthly payments of \$32 on the \$500 note secured by the trust deed on this property.

Defendant also offered to show that the Dudas authorized it to use the \$300 in clearing the property of special assessment liens, and that they also authorized defendant to collect the \$500 mortgage

note made by plaintiffs and secured by a trust deed on the property at 2419 North Long avenue, and to use sufficient of that money to pay any unpaid special assessments on that property. This evidence was erroneously excluded, the case having been tried by plaintiff's counsel on the theory that the \$300 could not be used by the defendant to pay the special assessments without the authority of plaintiffs.

We are unable to understand why the Dudas (unless it may be said that they were to clear the property they were conveying of all taxes and assessments) should authorize defendant to use the \$300 to redeem the North Long avenue property from special assessment sales. Under the written contract the money was to be given to them. We are also unable to understand why the plaintiffs should execute their note for \$500 and secure it by a trust deed on the property at 2419 North Long avenue, which was conveyed to them by the Dudas. In other words, plaintiffs, after the sale, owned the property on Long avenue on which they gave a mortgage for \$500, which mortgage was to be paid by them to defendant, who was authorized in writing by the Dudas to pay the special assessments levied on the Long avenue property. Plaintiffs were paying money to defendant to be used to pay a lien on their own property. But this confusion ought to be cleared up on a retrial of the case.

There is nothing in the written contract that shows that the properties were conveyed subject to the taxes of 1929, but the implication is that they were not to be conveyed subject to that year's taxes because the contract expressly provides that the taxes for 1930-1931 are to be prorated on the basis of the 1921 tax bill, and this is an indication that the taxes prior to 1930 had been paid.

Plaintiffs were not entitled to the \$300, but on the contrary the evidence shows that the money was paid by them to the defendant

...made by Plaintiff was secured by a check book in the ...
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to be turned over by defendant to the Dudas; so the judgment can not stand.

The judgment of the Municipal court of Chicago is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett, P. J., and McDurely, J., concur.

to be turned over to the Government in the event of the judgment not being made.

The judgment of the Honorable Court of Appeals is reversed and the same remanded.

REVEREND AND HONORABLE

REVEREND, W. J. and REVEREND, J. J. JAMES.

35583

EMILY ARMOUR,

(Plaintiff), Appellee,

v.

THE PENNSYLVANIA RAILROAD COMPANY,
a Corporation,

(Defendant) Appellant.

113
APPEAL TO

7
SUPERIOR COURT

COOK COUNTY.

273 I.A. 626²

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Superior Court of Cook County for \$6,000.00 in an action brought by plaintiff against defendant to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. The cause was heard in this court upon the appeal of defendant and an order entered affirming the judgment upon the ground that error had not been assigned as to the order of the trial court, denying the motion for a new trial, therefore, no reversible error had been assigned. Thereafter, the cause was taken to the Supreme Court on a writ of error, and after a hearing, an order was there entered that "the judgment of the Appellate Court is reversed and the cause remanded to that court with directions to consider the merits of the case upon the errors assigned."

In its opinion, the Supreme Court makes the following statement of facts and its ruling thereon:

"Roy W. Armour, accompanied by Emily Armour, his wife, on the evening of November 26, 1927, about 8:30 o'clock, drove an automobile east on Seventy-ninth Street at Western Avenue in the city of Chicago. About two blocks east of the latter street two tracks of the Baltimore and Ohio Chicago Terminal Railroad Company and farther east two tracks of the Pennsylvania Railroad Company cross Seventy-ninth street. The space between the tracks of the two railroad companies is approximately eighty-four feet. Between Western Avenue and the Pennsylvania railroad tracks and immediately south of Seventy-ninth street are two shanties each about six and one-half or seven feet square, one west of the Baltimore and Ohio Chicago Terminal railroad tracks and the other between and equi-distant from the two sets of railroad tracks. The first shanty is used as a telegraph office and the second affords shelter to the

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Opinion filed Feb. 7, 1934

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to have been established through the application of the following:

NO ONE BELIEVED THE STORY OF A MAN WHO HAD BEEN KILLED

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not been assigned as to the cause of the fatal heart attack.

100-443887-100

1. The first group of people who are interested in the study of the history of the United States are the people who are interested in the history of the United States.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

that the judgment of the majority is reversed and the case

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In the collection, the following items were identified:

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1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-2333, 2334-2335, 2336-2337, 2338-2339, 2340-2341, 2342-2343, 2344-2345, 2346-2347, 2348-2349, 2350-2351, 2352-2353, 2354-2355, 2356-2357, 2358-2359, 2360-2361, 2362-2363, 2364-2365, 2366-2367, 2368-2369, 2370-2371, 2372-2373, 2374-2375, 2376-2377, 2378-2379, 2380-2381, 2382-2383, 2384-2385, 2386-2387, 2388-2389, 2390-2391, 2392-2393, 2394-2395, 2396-2397, 2398-2399, 2400-2401, 2402-2403, 2404-2405, 2406-2407, 2408-2409, 2410-2411, 2412-2413, 2414-2415, 2416-2417, 2418-2419, 2420-2421, 2422-2423, 2424-2425, 2426-2427, 2428-2429, 2430-2431, 2432-2433, 2434-2435, 2436-2437, 2438-2439, 2440-2441, 2442-2443, 2444-2445, 2446-2447, 2448-2449, 2450-2451, 2452-2453, 2454-2455, 2456-2457, 2458-2459, 2460-2461, 2462-2463, 2464-2465, 2466-2467, 2468-2469, 2470-2471, 2472-2473, 2474-2475, 2476-2477, 2478-2479, 2480-2481, 2482-2483, 2484-2485, 2486-2487, 2488-2489, 2490-2491, 2492-2493, 2494-2495, 2496-2497, 2498-2499, 2500-2501, 2502-2503, 2504-2505, 2506-2507, 2508-2509, 2510-2511, 2512-2513, 2514-2515, 2516-2517, 2518-2519, 2520-2521, 2522-2523, 2524-2525, 2526-2527, 2528-2529, 2530-2531, 2532-2533, 2534-2535, 2536-2537, 2538-2539, 2540-2541, 2542-2543, 2544-2545, 2546-2547, 2548-2549, 2550-2551, 2552-2553, 2554-2555, 2556-2557, 2558-2559, 2560-2561, 2562-2563, 2564-2565, 2566-2567, 2568-2569, 2570-2571, 2572-2573, 2574-2575, 2576-2577, 2578-2579, 2580-2581, 2582-2583, 2584-2585, 2586-2587, 2588-2589, 2590-2591, 2592-2593, 2594-2595, 2596-2597, 2598-2599, 2600-2601, 2602-2603, 2604-2605, 2606-2607, 2608-2609, 2610-2611, 2612-2613, 2614-2615, 2616-2617, 2618-2619, 2620-2621, 2622-2623, 2624-2625, 2626-2627, 2628-2629, 2630-2631, 2632-2633, 2634-2635, 2636-2637, 2638-2639, 2640-2641, 2642-2643, 2644-2645, 2646-2647, 2648-2649, 2650-2651, 2652-2653, 2654-2655, 2656-2657, 2658-2659, 2660-2661, 2662-2663, 2664-2665, 2666-2667, 2668-2669, 2670-2671, 2672-2673, 2674-2675, 2676-2677, 2678-2679, 2680-2681, 2682-2683, 2684-2685, 2686-2687, 26

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Indirect evidence also has been obtained as to whether our system

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1967-08-10

Willard Frank and the above persons and their relatives from

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street or crossing flagman employed by the two railroad companies. Seventy-ninth street is a main thoroughfare and street cars are operated upon it. For nearly two thousand feet to the south of Seventy-ninth street neither tree nor building, save the two shanties, obstructs the view from Western avenue to the Pennsylvania tracks.

The testimony of the defendant in error and her husband is that he stopped the automobile in which they were riding before they crossed the Baltimore and Ohio Chicago Terminal railroad tracks; that as they proceeded the crossing flagman stood near his shanty and his red lantern was on the ground; that just before reaching the Pennsylvania railroad tracks the defendant in error discovered a freight train approaching from the south; that she warned her husband and he immediately turned the automobile to the left and applied the brakes; that the right side of the automobile was damaged, and that she, in consequence, was injured. They further testified that the freight train was running at a speed of thirty-five or forty miles an hour and that they had often driven over the same crossing.

Plaintiff in error called as witness the crossing flagman, the members of the crew which operated the freight train, and an engineer, a conductor and two police officers employed by the Baltimore and Ohio Chicago Terminal Railroad Company. Of these witnesses, nine in number, several testified that the automobile was driven across the first two tracks at a speed of thirty miles an hour; that the flagman stood in the street swinging his red lantern to give warning of an approaching train; that the driver not only disregarded the signal but compelled the flagman to jump aside and avoid injury, and that the automobile continued at undiminished speed until it ran into the side of the locomotive of the moving freight train. Nearly all of the defendant's witnesses testified that, as the freight train approached Seventy-ninth street, the whistle of the locomotive was sounded; that the headlight was burning and the bell ringing, and that the train was running at a speed of twenty-five or thirty miles an hour.

The contention that the Appellate Court should have decided whether, as a matter of law, the defendant in error was guilty of contributory negligence, and whether immediately prior to and at the time of the accident she exercised due care and caution for her own safety must be sustained. These questions were presented for consideration and decision by the ninth and tenth specifications of the assignment of errors and the brief and argument of the plaintiff in error in support of them. The questions so presented were available to the plaintiff in error in the Appellate Court notwithstanding the omission to assign error upon the denial of the motion for a new trial. Yarber v. Chicago and Alton Railway Co., 335 Ill. 589. "

The declaration filed in the case contained two counts in substance, as follows:

"The first count averred that plaintiff was riding east with her husband on 79th Street and was struck at 79th Street by a Pennsylvania Railroad train running north. Said count averred that the defendant then and there negligently, carelessly, wilfully and wantonly, by its servants in charge

of said train, drove and operated the same up to and over said intersection at a high and dangerous rate of speed without giving notice or warning of its approach by the use or display of lights or bell, gong, whistle or of other adequate means of giving or warning, and that by and through said negligence, carelessness, wilful and wanton misconduct and omission of the defendant, the said locomotive struck the automobile wherein the plaintiff was riding and inflicted upon her the injuries complained of in the declaration.

The second count averred that the said railroad company was operating a railroad train in a northerly direction across 79th street, which street ran east and west and was crossed by said railroad tracks at a right angle and that the point of intersection was closely built up with buildings so that the view of the said railroad was obstructed until a person was immediately upon or within a distance of a very few feet from said crossing; that the defendant between the hours of 9:00 and 10:00 o'clock operated a train consisting of a locomotive and freight cars northward upon its tracks toward said intersection with 79th Street and that it was the duty of the defendant to use reasonable care to prevent the plaintiff who was lawfully traveling toward said crossing from coming on the same without knowledge of the approaching engine and train of cars and to that end it was its duty to maintain at said crossing suitable gates or bells, or to have a watchman stationed there, yet the defendant did not regard its duty in that behalf, but then and there negligently, carelessly, wilfully and wantonly failed and neglected to have and maintain at said crossing any gates, bell or watchman, and did so drive and operate said train upon said intersection at the high and dangerous rate of speed of thirty miles per hour and through said negligence, carelessness, wilful and wanton misconduct and omission of the defendant, as aforesaid, the said locomotive struck the said automobile and inflicted upon the plaintiff the injuries complained of in the declaration."

The decision of the Supreme Court casts upon this court the duty of determining, from the evidence adduced, two questions, first, as to whether or not plaintiff was guilty of contributory negligence, and second, whether or not immediately prior to and at the time of the accident she exercised due care and caution for her own safety. Also, the question is presented as to whether or not defendant was guilty of the negligence charged. In passing upon the question as to whether or not the plaintiff was guilty of contributory negligence at the time and place in question, it must be kept in mind that she was a passenger and not the driver of the automobile.

In Dee v. City of Kern, 343 Ill. 36, the Supreme Court, said, page 42:

"It is the duty of a passenger in a vehicle, where

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The following account of the life of the late Sir John Lubbock, Bart., is taken from the "Lubbock Papers," which have been deposited in the Public Record Office, and are now open to the inspection of the public. The account is given by Sir John's son, Lord Alton of Liverpool, who was born in 1831, and died in 1913. The account is given in a letter to the Public Record Office, dated 1913, and is signed by Lord Alton of Liverpool.

In U.S. v. Wirtz, 392 U.S. 56, 58, 88 S. Ct. 1071, 20 L. Ed. 2d 1099, 392 U.S. 56, 88 S. Ct. 1071, 20 L. Ed. 2d 1099, the Court held that the Government's failure to disclose the existence of a confidential source to the defense constituted a violation of the defendant's right to a fair trial.

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he has an opportunity to learn of danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right, because someone else is driving, to omit reasonable and prudent efforts on his own part to avoid danger. (Pientz v. Chicago City Railway Co., 384 Ill. 248; Flynn v. Chicago City Railway Co., 350 Id. 460; Hoag v. New York Central and Hudson Railway Co., 111 N. Y. 199.) When there is any evidence before the jury which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (Pientz v. Chicago City Railway Co., *supra*.) In determining such question this court can examine the record only to determine whether there is any evidence so tending to support the cause of action. (Hinchliffe v. Menis Teaming Co., 374 Ill. 417; Reiter v. Standard Scale Co., 337 Id. 374; Libby, McNeill & Libby v. Cook, 332 Id. 206.)" (*Italics ours*)

See also Flynn v. Chicago City Railway Co., 350 Ill. 460,

as follows:

"And where a passenger has reason to apprehend danger he is not at liberty to leave the exercise of due care to the driver, alone. For example, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both were killed by a collision at a crossing, in an action brought by the administratrix of the wife against the railroad company it was held that she had no right, because her husband was driving, to omit some reasonable and provident effort to see for herself that the crossing was safe, and that she was bound to look and listen. * * * In cases of this kind it is no less the duty of the passenger, where he has the opportunity to do so, than the driver, to learn of the danger and avoid it if possible. * * * The general rule in this class of cases is, that the burden of establishing, affirmatively, freedom from contributory negligence is upon the plaintiff, or, in the language of the opinion in Folger v. B. B. & B.Y. R. Co., 88 N. Y. 202, that 'plaintiff approached the crossing where the collision and injury occurred, with prudence and care and with senses alert to the possibility of approaching danger'. And this rule obtains even where the railroad company neglects to ring its bell or sound its whistle, as required when its trains approach a crossing. (Cullen v. B. & N. C. Co., 113 N. Y. 688.) * * * It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger and avoid it if practicable. The plaintiff was sitting upon the seat with the driver, with the same knowledge of the road, the crossing and the environments, and with at least the same, if not better, opportunity of discovering dangers, that the driver possessed and without any embarrassment in communicating them to him. The rule in such case is laid down in Hoag v. New York Central and Hudson River Railroad Co., 111 N. Y. 199, where husband and wife were sitting upon the same seat in a vehicle driven by the husband and both killed by a collision at a crossing, and in an action brought

by the administratrix of the wife against the railroad company it was held 'that she had no right because her husband was driving, to omit reasonable and prudent effort to see for herself that the crossing was safe.'

Supplementing the statement of the Supreme Court, we note that plaintiff testified that as she and her husband approached the Baltimore and Ohio tracks, they stopped because "we heard a train about a half block or a block north on the Baltimore and Ohio tracks. We looked to the south and we looked to the north and saw nothing coming. We saw this train standing still, so we ventured to cross, feeling that if there was a train coming, the flagman would be standing in the center of the crossing. We crossed and I saw this train coming and immediately cried to my husband, 'There comes a train.' He put on the brakes and turned the car, but the train was on us before we had a chance. The lantern was on the ground alongside the shanty. The flagman was standing about half way between the shanty and the walk. The train was a half block away when I first saw it. The headlight was very dim." On cross-examination she testified that "no whistle was sounded on the train as we came over the intersection that evening. The accident happened at night. There were artificial lights. It was somewhat like dusk. In going between the Baltimore and Ohio and the Pennsylvania tracks I think we were traveling about 10 or 12 miles an hour. There were no warning bells or signals, or any mechanical device for the indication of the approach of a train except a flagman." She was interrogated as follows:

"Q. You may state whether or not you ever saw a flagman on that crossing."

"A. Had seen a flagman on the crossing and know there was a practice of warning when trains approached that crossing. When there was a train approaching the flagman would always be in the middle of the road. When it was night he would swing his lantern and if it was day he would swing the stop sign."

Over the objection of the defendant, Roy W. Armour, the husband of plaintiff and driver of the car in question, stated that

the following information was obtained from the records of the
the following information was obtained from the records of the
the following information was obtained from the records of the

and the other two are not observed.

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Over the objection of the defendant, who is present, the
Court of Appeals and the Court of the District of Columbia, stated that

as they were driving east on 79th street, he stopped his car at the Baltimore and Ohio crossing and noticed a locomotive standing possibly a block and a half north of the crossing, and that he noticed the flagman standing near his shanty over on the walk between the two sets of tracks and that he knew it was safe to cross; that he crossed the Baltimore and Ohio tracks and started toward the Pennsylvania tracks; that he looked north and south and noticed the watchman standing on the walk; that suddenly his wife said, "Here comes a train,"; that he saw the locomotive almost upon them, applied the brakes and turned the automobile to the left, and that at practically the same time the locomotive struck, and that he was in the habit of going across at least twice a week.

On behalf of defendant, Ernest S. Powell, a claim agent of defendant company, testified that at the time of the accident, standing on Western Avenue looking east on 79th street on the south side of 79th street, there were no obstructions to the view - it was all open prairie; that the Baltimore and Ohio and Pennsylvania tracks parallel each other south of 79th street for 1,000 to 1,500 feet; that there was one electric light at the intersection on the south side of 79th street approximately 23 feet west of the center line on the east Baltimore & Ohio track, and another light on the south side of 79th street approximately 38 feet east of the center line of the west Pennsylvania track; that a flagman's shanty 6½ or 7 feet square was located on the south side of 79th street midway between the two rights of way, and that on the south side of 79th street and west of the Baltimore and Ohio tracks there was a telegraph operator's shanty. On cross-examination, this witness stated there were no lights on the south side of the street between the Baltimore and Ohio and Pennsylvania tracks; that there were no gates at the intersection and no automatic signals, no bells operated, and that there were no flashlights.

that they were driving east on 7th Street, the witness did not see the
locomotive and also observed that the locomotive was moving west-
wardly a block and a half north of the crossing, and that it passed
the witness standing near his house over on the east between the
two sets of tracks and that he knew it was late in evening; that he
observed the witness and also toward him as they went toward the
Pennsylvania station; that he looked north and south and observed the
witness standing on the east; that he saw the witness at the
corner a train; that he saw the locomotive almost upon him, and
the driver and turned the automobile to the left, and that it passed
directly the same time the locomotive passed, and that he was in the
habit of going across at least twice a week.

On behalf of defendant, James E. Howell, a clerk in charge of
the night company, testified that at the time of the accident,
standing on western tracks facing west on 7th Street on the south
side of 7th Street, there were no obstructions to the view - it was
all open prairie; that the witness and also the Pennsylvania station
were each other north of 7th Street for 1,200 to 1,500 feet;
that there was one electric light at the intersection on the north side
of 7th Street approximately 15 feet west of the center line on the
west side of 7th Street, and another light on the south side of
7th Street approximately 15 feet east of the center line of the street
Pennsylvania station; that a witness's shadow is at 7 foot distance and
located on the south side of 7th Street about 15 feet west of the center
line of the street on the south side of 7th Street and west of the
witness and also toward him as they went toward the Pennsylvania station.
On cross-examination, this witness stated there was no light on the
south side of the street between the witness and the Pennsylvania station;
that there were no signs of the intersection and no electric
lights, no bells operating, and that there were no flashlights.

Bert Newcomb, employed by the Baltimore and Ohio Terminal Railroad Company as a conductor, testified that on the evening of November 26th, 1927, he was in charge of an engine which stood on the Baltimore and Ohio tracks north of 79th street; that he first saw the Pennsylvania train coming north when it was at 87th street; that he heard the whistle blow, and that he could see the headlight on the engine distinctly, and that the bell on the engine of this train was ringing when it crossed 79th street. This witness further testified that he saw a Hudson Sedan coming from the west on 79th street, and saw it run into the side of the Pennsylvania engine back of the cylinder. He stated that at this time, he was on his way to a telephone booth at the southwest corner of 79th street and the tracks; that the automobile did not stop, but went over the intersection by the flagman into the side of the engine; that the automobile was going from 30 to 35 miles an hour, and that at that time, the crossing flagman was between two street car tracks in the center of the street, swinging a red light, and that the automobile went right on past and did not stop or slack any.

B. A. Fowler testified that he was a locomotive engineer employed by the Pennsylvania Railroad Company, in charge of the train which collided with the automobile in question on the night of November 26th, 1927; that the train involved was a freight train on which there were 35 or 36 cars; that in approaching 79th street looking westward you can see as far as Western Avenue, or about a quarter of a mile south of the intersection; that as he approached 79th street he sounded the usual crossing signal, two long and two short blasts of the whistle, that the bell was ringing and that the headlight was burning; that he was on the right side of the engine and could not see anything that occurred on the west side of it; that he stopped the train immediately after the accident, which he did not see. On cross-examination, this witness testified that he stopped the train within 10 or 12 car lengths.

...test records, supplied by the Baltimore and Ohio Railroad
...company as a computer, testified that on the evening of
November 28th, 1927, he was in charge of the train which
...the Baltimore and Ohio Railroad runs at this station; that on this
...the Pennsylvania Railroad coming north - that it was at this station;
...that he heard the whistle blow, and that he heard the whistle
...on the engine electrically, and that the bell on the engine of this
...train was ringing when it started from station. This witness further
...testified that he saw a person coming from the west on this
...train, and saw it run into the side of the Pennsylvania Railroad track
...of the cylinder. He stated that at this time, he was on his way to
...testimony heard at the southeast corner of York Street and the
...street; that the automobile did not stop, but went over the inter-
...section of the tracks into the side of the engine; that the automobile
...was going from 20 to 25 miles an hour, and that at this time, the
...distance between the engine and the car was in the order of
...the street, twisting a red light, and that the automobile went right
...at that and did not stop or slow up.

E. J. Foster testified that he was a passenger on the
...supplied by the Pennsylvania Railroad Company, in charge of the train
...which collided with the automobile in question on the night of November
...28th, 1927; that the train involved was a freight train in which there
...were 20 or 25 cars; that in approaching York Street looking westward
...on was not in line with the street light, or about a quarter of a mile
...north of the intersection that he saw a person who stated he recognized
...the usual crossing signal, two long and two short blasts of the whistle,
...that the bell was ringing and that the locomotive was backing; that he
...was on the right side of the engine and could not see beyond that
...occurred on the west side of it; that he started the train immediately
...after the collision, which he did not see. On cross-examination, this
...witness testified that he started the train within 10 or 15 seconds

On re-direct examination, this witness testified that when he reached the intersection in question, his train was going about 30 miles an hour.

Orrin Brebruner testified on behalf of the defendant that on November 26th, 1927, he was employed by the Pennsylvania Railroad Company as a fireman; that he recalled the accident in question; that he was the fireman on the train in question and was sitting on the west side of the cab going north, and that the head brakeman was sitting with him; that as the train approached 79th street it was coasting down to the interlocking switch; that the headlight on the engine was burning, and that he heard a whistle - two long blasts and two short blasts - that the bell was ringing at the time. This witness further testified that he saw the automobile coming into the crossing and thought it was going to stop, which it did not do but ran into the engine; that the flagman was out in the middle of the road with a red light in his hand, and that the flagman was using his signal lamp at this time; that the speed of the train on which he was riding was from 15 to 20 miles an hour; that when you get to that curve you can see Western avenue. This witness further testified that the bell on the engine at the time operated automatically. The testimony of this last witness was corroborated in most respects by Martin Horney, who testified that he was a brakeman on the Pennsylvania train in question, and at the time, was sitting on the seat of the cab of the engine in the company of the fireman.

W. J. Hewkirk, a police officer employed by the Baltimore and Ohio Railroad, testified that he was at 79th street and the Baltimore and Ohio and Pennsylvania crossing on the evening of November 26th, 1927, when the accident in question occurred; that he saw the Pennsylvania train in question coming from the south; that the headlight on this train was burning, and that he could see it coming as far away as 83rd street. This witness testified that he

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did not recall hearing any whistle, but that he did hear the bell ringing and saw the flagman out in the center of 79th street swinging a red lantern; that he first saw the automobile half way between 79th street and Western avenue, and that at that time, it was running at approximately 35 miles an hour; that the automobile did not stop at any time before it came to the intersection, and that it ran right over the Baltimore and Ohio tracks to the Pennsylvania tracks and into the side of the Pennsylvania engine. He further stated that there is nothing to obstruct the view for 1,200 to 1,500 feet south of 79th street.

Bert Bolen testified that he was a patrolman employed by the Baltimore and Ohio Railroad, and had occupied such position for six years; that at the time of the accident in question he was about 125 feet north of 79th street; that he first saw the train on the Pennsylvania track coming north when it was 300 or 400 feet south of 79th street; that at that time, the headlight on the train was shining, the bell was ringing and he heard the engine blow the regular crossing whistle for the crossing; that he saw the flagman at the middle of the crossing swinging a red lantern; that he saw the automobile at the time of the accident and just before, when it was about 20 feet from the engine, which it struck.

Samuel E. Shewidge testified on behalf of defendant that on the evening in question he had charge of an engine for the Baltimore and Ohio Railroad, and that at the time in question, he was about 50 yards north of the crossing; that he saw the engine on the Pennsylvania tracks coming north, and that he heard the blow of the whistle for the crossing; that he saw the car coming down 79th street about a block off of Western Avenue; that the automobile did not stop, and that he judged it was running about 35 miles an hour, and that no attention was paid to the crossing watchman with the red lantern; that the driver of the automobile almost ran over the watchman, who was swinging

[illegible]

There is a great deal of talk about the "new" and "old" of the world, but it is all very relative. The world is always changing, and the only way to keep up with it is to be constantly learning and growing. The world is not a static thing, but a dynamic one, and we must be able to adapt to its changes. The world is a place of constant flux, and we must be able to move with it. The world is a place of constant change, and we must be able to adapt to its changes. The world is a place of constant flux, and we must be able to move with it. The world is a place of constant change, and we must be able to adapt to its changes.

[illegible]

his lamp, and that there is nothing to obstruct the vision of a train approaching from the south for a half mile.

William Kaduczak testified that he was employed as crossing flagman and watchman on the evening in question, and that at the time in question he saw the automobile as it came into the intersection and that at that time he was standing right in the middle of the crossing and held the red lantern and shook it; that the automobile came from the west to the east and that it did not stop at the Baltimore and Ohio tracks; that he tried to stop them and jumped in front of the car and had to jump to one side to avoid the automobile, and that at that time, the automobile hit the engine. This witness testified that he heard the whistle and saw the headlight and that the bell on the locomotive was ringing.

As intimated by the Supreme Court, the record discloses greater that a number of witnesses presented a situation which suggests that plaintiff was guilty of contributory negligence and want of ordinary care. This court said in Norkevich v. Atchison, Topeka & Santa Fe Ry. Co., 263 Ill. App. 1.

"It is the province of the jury to determine the credibility of witnesses and the weight to be given their testimony. They may test the truth and weigh the evidence by their knowledge and judgment derived from experience, observation and reflection. 'There are many things which a jury observes on the trial in such case that do not appear from the printed record - the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review.' (Mills & Co. v. Duke, 332 Ill. App. 277.) In Wirich v. Forschner Contracting Co., 313 Ill. 343, the court said (P. 358): 'One of the recognized benefits of trial by jury is that the jury sees and hears the witnesses, which gives them superior advantage over a reviewing court in determining the credibility of the witnesses and the weight and credit that should be given their testimony.' Many authorities to the same effect might be cited. The wise rule of the law that the preponderance of evidence is not necessarily determined by the greater number of witnesses was born of experience. If the law were otherwise many cases would be determined by witnesses whom the jury and trial court disbelieved. However, the question of the preponderance of the evidence does not arise in this court. Under the law we cannot disturb the verdict of the jury unless it is clearly against the manifest

weight of the evidence. Manifest means clearly evident, clear, plain, indisputable."

Nevertheless, in view of the statement made by the Supreme Court in this case, we feel that the case should be retried, and it is, therefore, reversed and remanded for a new trial.

REVERSED AND REMANDED.

WILSON, AND HERREL, JJ. CONCUR.

weight of the evidence, which is almost entirely against
the defendant, and in view of the fact that the defendant is in
this case, we feel that the case should be retried, and it is there-
fore, reversed and remanded for a new trial.

REVEREND THE HONORABLE
JUDGE OF THE COURT

CLERK, U.S. COURT, D.C. DISTRICT OF COLUMBIA

Respectfully,
Yours truly,
[Signature]

No. 36181.

OSCAR J. BODELSON,

Plaintiff in Error,

vs.

JACOB ADLER,

Defendant in Error.

WRIT OF ERROR

CIRCUIT COURT

27 31. A. 026³

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff in a suit brought against defendant in the Circuit Court of Cook County to recover for a balance alleged to be due to plaintiff on account of work said to have been done, ^{for} and materials charged to have been furnished, ^{for} and decorating the place of business of defendant. The cause was tried without a jury. The court found for defendant, upon which finding the judgment for costs appealed from was entered. The declaration consisted of the common counts, to which a plea of the general issues and special pleas of res adjudicata were filed. There is no contest over the amount of plaintiff's claim, or over the fact that the labor and materials were furnished.

In the beginning, plaintiff contended that he had entered into a contract with defendant for the furnishing of labor and materials in and about the decorating of defendant's place of business. During the trial, he changed his position, and sought to recover the value of work done and materials furnished.

In February, 1925, C. W. Linster, a plastering contractor, filed a bill to foreclose a mechanic's lien on defendant's property for work alleged to have been done, and for materials alleged to have been furnished in and about the improvement of defendant's place of business. In December, 1924, Bodelson, plaintiff in the instant case, filed an answer in the nature of a cross bill in this mechanic's lien foreclosure suit, in which it is alleged that he, Bodelson, had entered

NO. 101

U. S. DISTRICT COURT

IN THE DISTRICT OF COLUMBIA

vs.

JOHN J. ROBERTSON

Defendant in Error.

Opinion filed Feb. 7, 1934

MR. JUSTICE THOMAS M. SWAN, Chief Justice of the District of Columbia.

This is an appeal by plaintiff in a suit brought against de-

endant in the Circuit Court of the District of Columbia for a balance

owed to be due to plaintiff on account of work said to have been

done for

him, and materials alleged to have been furnished, and for

loss of business of defendant. The cause was tried without a jury.

A verdict was returned for defendant, upon which finding the judgment for

the plaintiff was entered. The declaration consisted of the

following counts, to which a plea of the general issue and special plea

was filed. There is no contest over the amount of

plaintiff's claim, or over the fact that the labor and materials were

furnished.

In the beginning, plaintiff contended that he had entered

into a contract with defendant for the furnishing of labor and materi-

als in and about the decorating of defendant's place of business.

At the trial, he charged his position, and sought to recover the

balance of work done and materials furnished.

In February, 1933, J. J. Robertson, a contracting contractor,

and a bill to foreclose a mechanic's lien on defendant's property

was filed in the Circuit Court of the District of Columbia, and the materials alleged to have

been furnished in and about the decorating of defendant's place of

business. In December, 1934, Robertson, plaintiff in the instant case,

filed an answer in the nature of a cross bill in this case, in which

he alleged that he, Robertson, had entered

into a contract with one Schwartz to furnish labor and materials upon defendant's premises, for the value of which labor and materials he now seeks to recover in the instant case. The petition was dismissed as to Linster, the complainant, because his claim was settled, and as to Bodelson, the plaintiff herein and cross-petitioner there, for want of equity. It is claimed by plaintiff that he did not authorize the filing of the cross-petition in the mechanic's lien suit, nor did he authorize the statement made therein that he was a sub-contractor of Schwartz for the furnishing of the labor and materials involved in that suit. Plaintiff testified in the instant case to the effect that his contract ^{was} with Adler, defendant, and not Schwartz, the general contractor. On cross-examination, he stated that he had dictated to a stenographer the items, indicating the amount of labor performed, the materials furnished and the prices therefor, which, after being transcribed, were delivered to the attorney who represented him in the mechanic's lien case, and were attached to the cross bill filed in that proceeding.

Schwartz, the general contractor, testified that he had the contract for remodeling and decorating defendant's place of business. A copy of such contract was offered and received in evidence and shows this to be true. Schwartz further testified that in April or May he informed plaintiff that he, Schwartz, had such a contract with defendant, and that "I want you (meaning plaintiff) to work with me on the decorating of the place - I want you to handle the decorations for me," to which plaintiff assented. Schwartz also testified that "I gave him a general description of the work I wanted done, and about what manner I would like to have it done," and that Bodelson, at the request of Schwartz, prepared sketches of the proposed decorations and furnished them to Schwartz.

The defendant testified as to the contract between him and Schwartz, that such contract was read to Bodelson in his, defendant's,

2

into a contract with one Schmitt to furnish labor and materials upon defendant's premises, for the value of which labor and materials he now seeks to recover in the instant case. The petition was dismissed as to libel, the complaint, because his claim was settled, and as to negligence, the plaintiff herein and cross-petitioner there, for want of equity. It is claimed by plaintiff that he did not authorize the filing of the cross-petition in the master's lien suit, nor did he authorize the statement made therein that he was a mid-venturer or partner for the furnishing of the labor and materials involved in the suit. Plaintiff testified in the instant case to the effect that his contract with ^{was} Schmitt, dated at, and not Schmitt, the general contract or, on cross-examination, he stated that he had dictated to a stenographer the terms, including the amount of labor performed, the laborer's name, and the price therefor, which, after being transcribed, was delivered to the attorney who represented him in the master's lien case, and was attached to the cross bill filed in that proceeding.

Schmitt, the general contractor, testified that he had the contract for removal and decorating defendant's place of business. A copy of such contract was obtained and received in evidence and shown to be true. Schmitt further testified that in April or May he informed plaintiff that he, Schmitt, had such a contract with defendant, and that I was for (plaintiff) to work with me on the decorating of the place - I was not to handle the decorations for me, so which plaintiff assented. Schmitt also testified that "I gave him a general description of the work I wanted done, and about that manner I would like to have it done," and that Schmitt, at the request of Schmitt, prepared sketches of the proposed decorations and furnished them to Schmitt.

The defendant testified as to the contract between him and Schmitt, that such contract was read to Schmitt in his, defendant's

presence, and that he had no separate agreement with Bodelson, although at various times he had at the request of Schwartz, paid Bodelson some money on account of the work done.

As the trial of this case progressed, some confusion developed as to the character of plaintiff's action, and the question arose as to whether plaintiff sought to recover on an express contract between himself and the defendant, or on an implied contract claimed to have resulted from his having furnished materials and labor for defendant. The question was asked of counsel for plaintiff by counsel for defendant: "Do I understand that counsel claims to be suing upon an implied contract or an express contract? I would like to know. I had the impression from the evidence yesterday that counsel was suing on an express contract. If I am wrong I would like to be corrected at this moment," to which counsel for plaintiff replied: "Yes, I will correct counsel. I think it is important to have a definite understanding. We had no express contract either in writing or orally. We are suing upon an indebitatus assumpsit for the materials supplied and labor furnished according to the plan of installation which the parties recognized as being their guide in their work."

From the cross bill filed in the mechanic's lien case, and from the testimony of the witnesses, it is apparent to this court that plaintiff's contract for the furnishing of the labor and materials sued for was with Schwartz, who had a contract for the work with defendant. The trial court heard the evidence and arrived at that conclusion, and we see no reason to disturb the finding or the judgment. Therefore, the judgment is affirmed.

AFFIRMED.

WILSON and REBEL, JJ, CONCUR.

...and that he had no personal knowledge of the defendant, although
...times he had seen the defendant at the defendant's home
...on account of the work done.

...in the trial of this case, ...
...the character of plaintiff's ...
...plaintiff sought to ...
...and the defendant, ...
...from his having furnished ...
...was ...
...I ...
...of ...
...from the evidence ...
...fact. If I ...
...which counsel for plaintiff ...
...it is ...
...contract either in writing ...
...plaintiff ...
...ing to the plan of ...
...of their ...

...from the ...
...the testimony of the ...
...plaintiff's ...
...with ...
...trial court ...
...no ...
...judgment is ...

...

...

36295

MAE F. QUINLIVEN,

(Plaintiff) Appellee,

v.

GEORGE W. SHEEHAN, HARRISON PARKER, L. J.
LIFKA, NORTH AMERICAN TRUST COMPANY,
formerly IROQUOIS TRUST COMPANY, and
ILLINOIS VALLEY TRUST COMPANY,

(Defendants) Appellants.

115
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

273 I.A. 826

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against defendants in a suit, wherein plaintiff charges that these defendants obtained various sums of money from her by fraud and deceit. The judgment is upon the verdict of a jury. After the record was filed in this court, plaintiff moved that the bill of exceptions be stricken from the files; also that the judgment of the Circuit Court be affirmed. These motions have been reserved to the hearing, but in view of the fact that the judgment of the Circuit Court is affirmed on the record, it will not be necessary to pass upon these motions.

The hearing was had upon a declaration consisting of two counts, an amended declaration filed January 13th, 1930, and an additional count filed during the trial on April 20th, 1932. In the amended first count, it is charged that George W. Sheehan, Harrison Parker, L. J. Lifka, Iroquois Trust Company, a corporation and Illinois Valley Trust Company, a corporation, through their agents and representatives, acting within the scope of their authority and in concert, appeared at plaintiff's home about February 1st, 1928, and on various other times near that date, and falsely and fraudulently told the plaintiff, among other things, that in 1923 and 1924 a group of trust company experts began to look into the possibility of establishing a trust company, which in addition to conducting the well known trust company activities, could legally operate nationally

Feb. 7, 1934

(Continued)

THOMAS J. BROWN, JR.,
JAMES B. BROWN, JR.,
JAMES B. BROWN, JR.,
JAMES B. BROWN, JR.,
JAMES B. BROWN, JR.,

(Continued)

Opinion filed Feb. 7, 1934

The following is a summary of the facts and circumstances of the case, as presented by the parties and the court. The case involves a dispute over the ownership of certain property, and the court has heard evidence from both sides. The court has found that the evidence is conflicting, and it is necessary to make a determination as to which side is more credible. The court has concluded that the evidence presented by the plaintiff is more convincing than that presented by the defendant, and it has granted the plaintiff's request for summary judgment. The court has also awarded costs to the plaintiff, and it has denied the defendant's request for summary judgment. The court has found that the defendant's evidence is insufficient to establish its case, and it has entered judgment in favor of the plaintiff. The court has also awarded costs to the plaintiff, and it has denied the defendant's request for summary judgment. The court has found that the defendant's evidence is insufficient to establish its case, and it has entered judgment in favor of the plaintiff. The court has also awarded costs to the plaintiff, and it has denied the defendant's request for summary judgment.

and sell trust funds on the monthly deposit or installment plan; that they sought to supply a demand of the unnumbered multitudes who are now barred from creating trusts; that for this purpose a research fund was provided and offices opened in New York City and Chicago; that lawyers, actuaries and other specialists were retained; that the trust laws of every state in the Union were codified and analyzed; that the charters of existing trust companies were studied and every important trust agreement and trust certificate of record was analyzed; that while this was going on, another department headed by an expert of the United States census, was working on a trust fund contract that could be sold nationally on monthly deposits; that the result of the work of both groups was the development of a plan to sell trust funds on the installment plan, which plan had been pronounced legal in every state in the United States, and actuarially sound; that the result of the charter research was the discovery of a trust company charter that would permit a trust company to sell trust funds on the monthly deposit or installment plan in every state of the United States; that such charter was granted to the Iroquois Trust Company by the State of Illinois, with the permission of the banking department of that state; that such a trust company organized in any state other than Illinois is not permitted to do business in any state other than the state of its organization, but that the charter granted to the Iroquois Trust Company permits it to do business in every state of the United States and in foreign countries; that such charter was granted in May, 1921, for a period of 99 years, and is irrevocable; that from 1921 to 1926 the distinctly broad and valuable corporate rights of the Iroquois Trust Company were unappreciated and unexercised but that its stock was then being offered for sale to a select group, among which the plaintiff was one; that the treasury shares of the Farmer's Loan & Trust Company of New York City were originally issued at \$25.00, and that they were now selling for

[illegible]

\$545.00 per share; that the original treasury shares of the Chatham-Phoenix Bank of New York City were issued at the same price and were now selling at \$355.00 per share; that the shares of the Iroquois Trust Company were as valuable as the shares of either of these two companies and would rapidly advance; that the business expansion reasons for increasing the shares of the Iroquois Trust Company were exactly the same as the business reasons for increasing the shares of the Farmer's Loan & Trust Company and also those of the Chatham-Phoenix Bank; that the shareholders who purchased Iroquois Trust Company treasury units or blocks could reasonably look forward to having the preferred shares retired at \$107.50 per share within a short period; that after the preferred shares were retired, all of the profits would be divided among the outstanding non-par common shares, which would make said non-par common shares many times their purchase price; that the corporation and banking laws of the State of Illinois were the most stringent of any state in the Union; that the Illinois State Constitution forbids, among other things, the issuance of any non-voting shares by an Illinois corporation; that no other state constitution has such a provision; that the Legislature of any other state might pass a law depriving a stockholder of the right to vote in a corporation organization in that state, but the Legislature of the State of Illinois could not pass such a law; it would be unconstitutional; that this was the reason for organizing the Iroquois Trust Company in Illinois, and that on account thereof it would be impossible for the shareholders in the Iroquois Trust Company to be defrauded or lose money on account of said investment, and that under the wise provision of the laws of Illinois it would be possible for the old and new subscribers for the increased capital issue of the Iroquois Trust Company to hold said shares for themselves, their children and their children's children, and that they would receive the profits of the Iroquois Trust Company on the basis of the present

1850 for West; that the original survey of the land
 made in 1800 was found to be incorrect in many
 places; that the survey of 1850 was found to be
 correct in many places; that the survey of 1850 was
 found to be correct in many places; that the survey of
 1850 was found to be correct in many places; that the
 survey of 1850 was found to be correct in many places;

capitalization; that the undeveloped field for the activities of a trust company operating in a national way may be gauged from the fact that there are 2,644 cities containing 70% of the population of the United States, without the service of a trust company, and that the Iroquois Trust Company intended to operate in each of these cities; that in addition thereto they would naturally obtain its proportion of trust business from the remaining 30% of the population of the country, most of which reside in cities enjoying the service of local trust companies, which were operating within the usual limited scope, but would not have the facilities of the Iroquois Trust Company; that the Iroquois Trust Company was operating with few employees and was making immense profits; that its business was under the strict state supervision, and that the laws regulating its business were such that a loss or depreciation in investment was impossible; that the Iroquois Trust Company intended to operate a trust company on the chain basis, the same as chain stores, from Maine to California; that the Iroquois Trust Company was the only company now so existing which could so operate; that the Iroquois Trust Company was a "chain" trust company, with a central security buying organization in New York City or Chicago with distribution branches everywhere, and would send its salesmen into smaller towns, selling public guaranteed securities and trust funds on the monthly deposit or installment plan; that its actuaries reported that the profits from a minimum monthly deposit or installment trust fund, if invested in first mortgages earning $5\frac{1}{2}\%$ interest, would average \$29.83 per year over the trust fund period; that this figure would be net after all allowances had been made for selling, administration, earnings on the cumulative trust fund, and collection over the trust fund period of 30 years; that figuring on the basis of 91,000 trust funds, which said parties told the plaintiff the Iroquois Trust Company either had or would soon have, a net profit of \$2,633,530.00 per year would result to this institution and that

[illegible]

at the present time, no other trust company in the United States, except the Iroquois Trust Company, was selling bonds on the installment plan, and that it was selling hundreds of millions yearly for cash.

It is also charged in the declaration that these parties represented to plaintiff that the Iroquois Trust Company, operating in a national way, would have open to it, various forms of trust company service, which would enable it to earn with safety, dividends of from 50 to 100% per year; that if plaintiff had any securities now invested, it would be to her advantage and immense profit to turn her securities into cash and invest the same in shares of the Iroquois Trust Company, and that if she would do so, it would provide for her old age, and that if she did so invest, she could buy shares in the Iroquois Trust Company on the installment plan, and that if at any time within 60 or 90 days, or at any time later she desired to withdraw from the company, that they would guarantee to sell her shares for a profit of 10% on the amount of her investment with the company. It is further alleged that on February 1st, 1932, upon the representation of these persons, the plaintiff purchased divers shares of stock in the Iroquois Trust Company to the amount of \$5,000.00, and that all of the representations made by these persons as to the Iroquois Trust Company were knowingly and willfully false and made for the purpose of misleading, deceiving and defrauding plaintiff of her moneys. It is also alleged that the stock so purchased was of little or no value and was not delivered to the plaintiff in accordance with the terms of defendants. It is further alleged that plaintiff bought such shares of stock solely upon the representations made to her by these defendants.

In the amended declaration filed April 20th, 1932, it is charged that in addition to the representations alleged to have been made in the first count of the declaration, that these people represented to plaintiff, among other things, in order to induce her to

purchase stock in the Iroquois Trust Company, that the stock of such company was so valuable that the English Government had offered one hundred million dollars for its charter, which was false; that the Iroquois Trust Company was the owner of and controlled the Iroquois Coal Company, Iroquois Steel Company, Iroquois Construction Company and the Iroquois Hospital, and it is alleged that all of such representations were false. It is further charged in said last mentioned count of the declaration that the Iroquois Trust Company was organized on May 23rd, 1931, with a capital stock of 500 shares, having a par value of \$100.00 per share, and that the stock was subscribed by the organizers, and that in order to make it appear that the subscribers had fully paid, the organizers charged against the purchase price of the stock \$5,000.00 as organization fees, \$25,000.00 in proposed securities consisting of 300 worthless shares of common stock of the Paoli Lithia Springs Hotel Company, and that \$20,000.00 worth of stock so subscribed was unpaid for; that about May 23rd, 1931, the shares of stock in the Iroquois Trust Company were redistributed by issuing the same to certain persons acting on behalf of the defendants, and that defendant, Harrison Parker, in the year, 1926, in furtherance of the conspiracy to defraud plaintiff and others, caused the capital stock of the Iroquois Trust Company to be increased from 500 to 2,500 shares, and that in order to obtain the fraudulent stock without paying for it, said Harrison Parker caused certain worthless notes to be accepted by dummy directors of the Iroquois Trust Company, elected by him, as payment for such stock, and that altogether by false representations made by these defendants, they induced plaintiff from time to time to turn over to them the sum of \$10,000.00, for which she has received nothing except receipts, and that no stock of any kind and nothing of value has ever been delivered to her on account of such payments to the defendants.

To the amended first count in the declaration, a plea of

to the extent that it is not possible to make a statement of the results of the investigation, and the results of the investigation are not available for the purpose of the investigation.

the general issue was filed, and to the additional count filed during the progress of the trial, a demurrer pro tunc was interposed and overruled. Thereupon the plea to the amended first count was ordered to stand to the additional count.

The grounds for reversal urged by defendants are, that the plaintiff did not prove the falsity of any representation; that as to the first count there is no allegation of a representation of a past or existing fact to the effect that the same is not true; that all the representations of the declaration were as to something to occur in the future; that the charge in the additional count that the English Government had offered one hundred million dollars for the charter of the Iroquois Trust Company or of any of the other charges assuming them to have been made and to be false, have not been so proven; that there ^{is} no evidence to justify a judgment against the Illinois Valley Trust Company, and that, therefore, the judgment being joint as to the defendants, it must be reversed; that plaintiff's counsel was guilty of improper conduct and speech throughout the trial of the case; that plaintiff had received two dividend checks of \$42.00 or \$43.00 each and had retained them and made no tender or offer to pay the same back, and that the court permitted a bill of complaint to be introduced in evidence which was filed by the North American Trust Company against Harrison Parker, one of the defendants, in the Circuit Court of Cook County which contained prejudicial charges against Parker, and that the amount of the damages assessed by the jury and the judgment entered thereon are excessive.

As to the amended first count, defendants in their brief make the following statement and admission: "The plaintiff attempted to prove, or perhaps did prove, that these representations and statements contained in the said amended declaration were made to her, by introducing Plaintiff's Exhibits 1 and 2. These two exhibits were circulars or pamphlets issued by the Iroquois Trust Company. Plaintiff's Exhibit 1 was entitled 'The Need and the Field for a Nationalized

Trust Company', and was an outline of the possibilities of profit-making to a trust company that sold funds or a trust estate on the installment plan. A perusal of this pamphlet will show that almost all of the statements therein expressed some opinion as to future profit-making and the possibilities in the trust company field. It sets forth the profits that trust companies had made and compared the present market price of the capital stock of various trust companies with the original offering price." Therefore, insofar as the amended first count of the declaration is concerned, it can be presumed that defendants admitted the truth of the allegations in such count, as to statements made to the plaintiff, including the statement that the stock of the Iroquois Trust Company was comparable in value with that of the various companies mentioned.

Plaintiff testified that some time in 1927 or 1928 she met a man by the name of Duart in connection with the purchase of stock in the Iroquois Trust Company. The witness stated that at that time she was the hostess of the Skokie Country Club, of which one Mr. Drevor was the president, and that Duart told the witness that the president of the club had sent him, Duart, to the plaintiff with the recommendation that she purchase stock in the Iroquois Trust Company. The witness further testified that she was given pamphlets by the defendant Sheehan, who she met in the office of the Iroquois Trust Company, where she was taken by Duart. She stated further that at the offices of the company she met in addition to Sheehan, defendants Parker and Lifka, to whom she was introduced; that while in this office she was shown certain circulars. These are the circulars in evidence referred to by defendants' counsel, and recite among other things that the Iroquois Trust Company was acting under a charter granted by the State of Illinois with the sanction of the banking department of the state, which charter permitted the sale of trust funds on the monthly deposit or installment plan, and that the

That country, the one in which it was established in 1847, was a small, remote, and isolated spot, and it was not until 1848 that it was opened to the world. It was then that the first American settlers came to the country, and it was then that the first American settlers came to the country.

Iroquois Trust Company was the only trust company in the United States selling trust funds on the monthly deposit or installment plan; that such trust company maintained with the Auditor of Public Accounts of the State of Illinois the amount of deposits required of a trust company accepting trusts. This circular also contains the statement that certain persons, mentioning John D. Rockefeller, every Astor, every Vanderbilt, every Carnegie, every Baruch, every Belmont and every Ford, considered trust funds as the best security for their investments; that a group of business men and bankers had examined the possibilities for profit in a trust company that would be legally organized to sell trust funds on the installment plan, and that offices were opened in New York and Chicago, and lawyers, actuaries and other specialists were retained; that the charter issued to the Iroquois Trust Company would permit it to sell trust funds on the installment plan. This circular also recited that trust companies of the character of the Iroquois Trust Company had earned enormous profits, and comparison was made with the United States Trust Company, which had paid a 50% cash dividend for 25 years; that the stock of the Guaranty Trust Company, now had a stock market value of \$352,000.00, and had received cash dividends for 35 consecutive years and that a person investing \$1,250.00 in its stock now has a cash income of \$30,000.00 per year; that an investment of \$150,000.00 in the Bankers Trust Company showed an increase in value of \$930,000.00, or \$10,000.00 short of a million dollars profit on the investment; that persons who purchased 75 shares of Equitable Trust Company in 1916 had a profit of 87% on the investment; that this trust company had long been looked upon as John D. Rockefeller's Trust Company; that the stock of the Guardian Trust Company of Detroit, organized less than a year ago, at \$200.00 per share, had sold as high as \$400.00 per share. This circular also contained the list of a great many trust companies in the United States, showing the value of trust company stocks at that

time, compared the Iroquois Trust Company with them and suggested its probable and possible earnings to be comparable to these companies. It was further recited in this circular that a building for the headquarters for the trust company had been purchased for a cash consideration of \$405,000.00 and was named the Iroquois Trust Building, and that one of the best known bankers had been elected president. It states further that under the new plan of the Iroquois Trust Company, trust funds, would be sold by this company in units of \$3,600.00 each, and that a person may invest \$10.00 a month for 240 months, or a total of \$2,400.00 and that at the end of the contract period he would withdraw \$3,600.00, and that the difference between \$2,400.00 and \$3,600.00, or \$1,200.00, is the interest or profit which would be earned on the money as it was periodically deposited. It is also recited that under the new state laws of the State of Illinois, no trust company incorporated under the same act as the Iroquois Trust Company in the State of Illinois has failed, and that experts say a failure of a trust company so incorporated is almost impossible, and that customer ownership of such an institution, in which plaintiff was asked to become a participant, would in all probability earn as much for its holders as one in Connecticut, which recently declared an extra dividend of 100%. It is apparent that these statements were made to induce the plaintiff and others to believe that the stock of the Iroquois Trust Company was comparable in value to these various companies.

Another circular was shown to plaintiff in which it recites that the Lawyers Mortgage Company of New York sells each year \$100,000,000 of bonds and mortgages; that it has sold \$987,000,000 of such bonds and mortgages and its cash profit exceeded a million dollars per year. Throughout these circulars it is claimed and represented that because of the character of the charter issued to the Iroquois Trust Company, such company has superior opportunities to

first, compare the proposed terms with those suggested
 its probable and possible results to be compared to those
 is now being made in this district and a similar one for
 headquarters for the same company and then determine the value
 consideration of \$25,000.00 and the value of the property
 and that one of the same group would not have been possible.
 it is also further that under the plan of the proposed terms
 company, terms could be made to give the company an option of
 \$2,500.00 more, and that a further sum of \$100,000.00 would be
 needed, or a total of \$2,500.00 and more as the sum of the payment
 period be made otherwise \$1,000.00, and that the difference between
 \$2,500.00 and \$1,000.00, or \$1,500.00, is the amount to be paid
 would be added on the money to its own responsibility. It
 is also noted that under the present plan of the district
 no first company interested under the plan of \$25,000.00
 terms company in the case of Illinois and Texas, and that
 by a failure of a first company to incorporate in Illinois
 and that district generally of which is included, in which case
 still not need to become a partnership, being in its own
 and no need for the district to be in connection, which means
 located in the district at \$100.00. It is suggested that the
 made was made to make the district the owner of the
 the effect of the proposed terms would be similar to that of
 these terms suggested.

Another matter was noted to suggest is that in
 twelve that the district company of the same will need
 \$100,000.00 of bonds and capital; and it was also noted
 of each bond and capital and the district would be a
 value for the. Therefore, the district is in a
 suggested that the company of the district would be

those of any other trust company in the land, and greater possibilities for making enormous profits for those who become customer owners. This is the theme which runs throughout both of these circulars. The plaintiff further testified that she was given these circulars the first time she went to the office of the Iroquois Trust Company in February, 1928. She testified that she talked to Parker, Lifka, Sheehan and Quart, and that they told her she would get 50% return on every dollar she invested, and that the increased value of her investment would be 100% on every dollar invested; that they told her the Iroquois Trust Company had all the trust funds of the Iroquois Coal Company; that it had charge of the Iroquois Coal Company, and that it was their property. The witness also testified that they told her they owned the Iroquois Steel Company, Iroquois Construction Company and the Iroquois Hospital, and that they had turned down an offer from the English Government of a half million dollars for the charter of the Iroquois Trust Company, and that there were plenty of people who would buy the stock and that she would become immensely rich. Witness testified that she told these persons she had \$4,000.00 and they asked for more, and that her total investment was approximately \$8,400.00.

Harrison Parker, one of the defendants, was called by the plaintiff and testified that there was no such institution as the Iroquois Coal Company, Iroquois Steel Company, Iroquois Construction Company, and that the Iroquois Trust company had no interest in the Iroquois Hospital.

As grounds for reversal, counsel for defendants does not contend that the jury was not justified in concluding that these statements were made to the plaintiff, as alleged and as she testified. The case on appeal is largely predicated upon the ground that there was no allegation or proof as to any past or existing fact, but

[illegible]

entirely as to something which might take place in the future. Plaintiff testified that these defendants told her that the English Government had made an offer of a half million dollars for their charter, and that such offer had been refused. This representation made by defendants was as to an alleged fact at or before the time the statement was made and was palpably false. It is also charged in the declaration and proven that representation was made to the plaintiff by the defendants that the Iroquois Trust Company owned the Iroquois Coal Company, Iroquois Steel Company, Iroquois Construction Company and the Iroquois Hospital. Defendant, Harrison Parker, testified that none of such institutions existed, except the Iroquois Hospital, and that the Iroquois Trust Company had no interest in the Iroquois Hospital, and defendants offered no proof to the contrary. This is an allegation and proof of a fact which was represented to have existed at the time the statement was made to plaintiff.

It is contended by defendants that there is no evidence in the record which justified the judgment against the Illinois Valley Trust Company. The evidence discloses, and it is not denied, that the Illinois Valley Trust Company had its offices with and was controlled and managed by some of these defendants who made these false representations to plaintiff and took her money away from her. It is represented here by the same counsel as the others, and it does not appear to have any adverse interest here. It also appears that these parties used letterheads as follows:

"Office of President
George W. Sheehan Company
Trust Securities
General Agents for United States
1944 Bankers Building,
Clark and Adams Streets,
Chicago, Illinois
Phone Central 7150

ILLINOIS VALLEY TRUST COMPANY
Founded 1912
Authorized by the State of Illinois to Accept
and Execute Trusts Under State Supervision
Peoria, Illinois

...ly as to ...

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Member American Bankers Association
 United States Chamber of Commerce
 Illinois Chamber of Commerce
 Associate Member Illinois Bankers Association."

and on this stationery under date of May 25th, 1929, C. W. Sheehan wrote a letter to plaintiff signed "C.W. Sheehan, Representing Illinois Valley Trust Company". It cannot escape liability when its officers apparently made it a part and parcel of the combination for the same purposes which the others seem to have had in mind.

The evidence shows that the defendants fraudulently procured from plaintiff the amount of money alleged in the declaration to have been taken from her, and for which the verdict was returned, and that she received nothing in return, except two dividend checks of \$42.00 and \$42.00 each, which latter are apparently taken into consideration in the amount of the verdict returned.

The jury saw and heard the witnesses and passed upon the evidence, and we see no reason for disturbing the verdict. The judgment is affirmed.

AFFIRMED.

WILSON AND NEBEL, JJ. CONCUR.

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PEOPLE OF THE STATE OF ILLINOIS,
Ex Rel. OSCAR NELSON, as Auditor
of Public Accounts of the State
of Illinois,

v.

BRainerd STATE BANK, a Corporation,

In the Matter of the Intervening
Petition of SHERIDAN BROTHERS IN-
CORPORATED, a corporation, MARY E.
SHERIDAN, Administratrix and PAUL
M. SHERIDAN, Administrator of the
Estate of Elizabeth K. Sheridan,
Deceased,

Appellees,

v.

IRWIN T. GILRUTH, as Receiver of
Brainerd State Bank, a Corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

273 I.A. 627¹

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order and decree of the Superior Court of Cook County, directing Irwin T. Gilruth, Receiver of the Brainerd State Bank to set off against three certain notes aggregating \$8,000.00, held by the bank and executed by Elizabeth K. Sheridan, deceased, and one note of \$8,000.00, due and owing to the bank by Philip H. Sheridan, a certain deposit of Sheridan Brothers Incorporated for the sum of \$2,535.54, on deposit with the Brainerd State Bank at the time such bank was closed.

In the proceeding instituted for the dissolution of the Brainerd State Bank, an intervening petition was filed by Sheridan Brothers Incorporated, Mary E. Sheridan, Administratrix, and Paul M. Sheridan, Administrator, wherein it is recited that on or about April 5th, 1930, Elizabeth K. Sheridan, now deceased, executed her promissory note payable to said defendant bank in the sum of \$15,000.00 and deposited with said bank, as security therefor, certain collateral then

CHIEF OF THE STATE OF ILLINOIS,
EX HON. OSCAR WELCH, as Auditor
of Public Accounts of the State
of Illinois,

v.

BRINARD STATE BANK, a corporation,

In the Matter of the Intervening
Petition of BRINARD STATE BANK
CORPORATED, a corporation, NANCY E.
SHARIDAN, Administratrix and
WILLIAM H. SHARIDAN, Administrator
of the Estate of Elizabeth H. Sharidan,
Deceased,

Respondent,

v.

WILLIAM T. CLINTON, as Receiver of
Brinard State Bank, a corporation,

Petitioner.

Opinion filed Feb. 7, 1934

THE FOLLOWING JUDGMENT WAS ENTERED BY THE COURT:

This is an appeal from an order and decree of the Superior Court
of Cook County, Illinois, entered March 1, 1933, in favor of the Brinard
State Bank to set off against three certain notes aggregating \$8,000.00,
held by the bank and executed by Elizabeth H. Sharidan, deceased, and
one note of \$5,000.00, due and owing to the bank by Philip H. Sharidan,
a certain deposit of Elizabeth Brinard State Bank at the time such bank
was closed.

In the proceeding instituted for the dissolution of the
Brinard State Bank, an intervening petition was filed by Elizabeth
Brothers Incorporated, Nancy E. Sharidan, Administratrix, and William H.
Sharidan, Administrator, wherein it is recited that on or about April
25, 1930, Elizabeth H. Sharidan, now deceased, executed her promissory
note payable to said defendant bank in the sum of \$15,000.00 and de-
posited with said bank, as security therefor, certain collateral then

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her property and now the property of her estate; that the said Elizabeth K. Sheridan executed said note as an accommodation maker for the benefit of Sheridan-Costello Incorporated, a corporation organized under the laws of the State of Illinois, in which Philip H. Sheridan was the principal stockholder; that the proceeds of the loan were not paid to Elizabeth K. Sheridan, but were deposited then and there to the credit of the commercial checking account of the corporation and entered upon the pass book thereof; that Elizabeth K. Sheridan was not a stockholder of said corporation and had no interest therein, but executed and delivered the note merely as an accommodation to and at the request of the bank for and on behalf of the corporation. A petition prayed that an order be entered directing the receiver of the bank to credit Sheridan-Brothers Incorporated with the payment of \$2,535.54 on said notes.

The record discloses that about May 5th, 1930, Philip H. Sheridan, who was the president of Sheridan-Costello Incorporated, visited the Brainerd State Bank and applied for a loan of \$15,000.00. Sheridan testified that he was told by an officer of the bank to bring his mother in and they would see what could be done about it, and that on the next day, Sheridan and his mother, Elizabeth K. Sheridan, visited the bank. He stated that his mother, Mrs. Sheridan, put up certain securities, that a loan of \$15,000.00 was made, that Mrs. Sheridan signed the note, and that the witness was given the pass book. It was stipulated that on April 5th, 1930, three notes for \$5,000.00 each were made and signed by Elizabeth K. Sheridan.

From the record, it also appears that the credit in question was extended to Mrs. Sheridan; that the loan was made to her for the purpose of enabling Philip H. Sheridan to open a Ford agency; that his mother was the one who advanced the money to him, and that the proceeds of the loan were deposited to the account of Sheridan-Costello Incorporated. About July 5th, 1930, when the notes came due, a payment of \$4,000.00 and interest was made on the loan, and the balance was re-

her property and now the property of her estate; that the said Elizabeth
K. Sheridan executed said note as an accommodation note for the benefit
of Sheridan-Jordan Bank, a corporation organized under the
laws of the State of Illinois, in which Philip K. Sheridan was the prin-
cipal stockholder; that the proceeds of the loan were not paid to
Elizabeth K. Sheridan, but were deposited with and there to the credit
of the commercial checking account of the corporation and entered upon
the pass book thereof; that Elizabeth K. Sheridan was not a stockholder
in said corporation and had no interest therein, but executed and de-
livered the note merely as an accommodation to and at the request of the
bank for and on behalf of the corporation. A petition prayed that an
order be entered directing the receiver of the bank to credit Sheri-
dan-Jordan Bank with the payment of \$5,000.00 on said notes.
The record discloses that about May 25, 1920, Philip K.
Sheridan, who was the president of Sheridan-Jordan Bank, visited
the Standard Life Bank and applied for a loan of \$15,000.00. Sheridan
advised that he was told by an officer of the bank to bring his mother
and that they would see what could be done about it, and that on the next
day, Sheridan and his mother, Elizabeth K. Sheridan, visited the bank.
He stated that his mother, Mrs. Elizabeth K. Sheridan, put up certain securities,
and a loan of \$15,000.00 was made, that Mrs. Sheridan signed the note,
and that the witness was given the pass book. It was stipulated that
on April 25, 1920, three notes for \$5,000.00 each were made and signed
by Elizabeth K. Sheridan.
From the record, it also appears that the credit in question
was extended to Mrs. Sheridan; that the loan was made to her for the
purpose of enabling Philip K. Sheridan to open a food agency; that his
mother was the one who advanced the money to him, and that the proceeds
of the loan were deposited to the account of Sheridan-Jordan Bank.
It was further stated that on July 25, 1920, when the notes came due, a payment of
\$5,000.00 was made on the loan, and the balance was re-

newed by Mrs. Sheridan by giving two notes for \$5,000.00 each, and another note for \$1,000.00. Mrs. Sheridan died on July 19th, 1930. On September 3rd, 1930, a payment of \$3,000.00 was made on the principal. The interest was paid on all the notes and they were extended periodically up to March 1st, 1931. On March 1st, 1931, Philip H. Sheridan executed a note for \$8,000.00 for the unpaid balance of principal. The notes of Mrs. Sheridan were retained by the bank. Philip H. Sheridan's note for \$8,000.00 was renewed about June 1st, 1931. This note is still in the hands of the receiver. The payments of principal and interest upon the indebtedness were made by checks drawn against the account of Sheridan-Costello Incorporated. The name of this corporation was afterwards changed to Sheridan Brothers Incorporated. At the time the bank was closed by the Auditor, Sheridan Brothers Incorporated had on deposit a checking account of \$2,535.54. Certain checks were thereafter presented, which were charged against the account, which reduced the account to \$2,320.04, and it is this amount which the court ordered credited against the notes of Mrs. Sheridan.

The receiver contends that the order of the Superior Court should be reversed for the following reasons, to-wit: that the matters of fact relied upon by the petitioners are not proper to be considered by the court for the purpose of granting the offset; that the testimony offered by the petitioners attempts to vary, disqualify, and, in substance, contradict the terms of the note of Elizabeth K. Sheridan and Philip H. Sheridan; that the facts relied upon by petitioners as shown by the evidence, fails to show right of set-off; that the indebtednesses are not mutual between the parties in that the debt of the bank is to a corporation, and that the amount due to the bank is from individuals, and that in the event the off-set should be allowed, it is in excess of the amount standing to the credit of Sheridan Brothers Incorporated, for the reason that after the bank had closed, checks to the amount of \$215.50 were returned for non-payment and

... by Mrs. ... giving two notes for \$5,000.00 each, and an-
other note for \$1,000.00. Mrs. ... dated on July 12th, 1931. On
September 2nd, 1931, a payment of \$3,000.00 was made on the principal.
The interest was paid on all the notes and they were extended period-
ically up to March 1st, 1932. On March 1st, 1931, William K. Sheridan ex-
ecuted a note for \$5,000.00 for the unpaid balance of principal. The
notes of Mrs. Sheridan were retained by the bank. William K. Sheridan's
note for \$5,000.00 was renewed about June 1st, 1931. This note is still
in the hands of the receiver. The payments of principal and interest
upon the indebtedness were made by checks drawn against the account of
William K. Sheridan Incorporated. The name of this corporation was alter-
wards changed to William K. Sheridan Incorporated. At the time the bank
was closed by the auditor, William K. Sheridan Incorporated had on de-
posit a checking account of \$2,250.00. Certain checks were therefor
presented, which were charged against the account, which reduced the
account to \$1,350.00, and it is this amount which the court ordered
retained against the notes of Mrs. Sheridan.

The receiver contends that the order of the Superior Court
should be reversed for the following reasons, to-wit: That the matters
at issue relied upon by the petitioners are not proper to be considered
by the court for the purpose of granting the relief; that the testi-
mony offered by the petitioners attempts to vary, directly, and, in
substance, contradict the terms of the note of William K. Sheridan
and Philip K. Sheridan; that the facts relied upon by petitioners as
shown by the evidence, fails to show right of set-off; that the in-
debtedness are not mutual between the parties in that the debt of
the bank is to a corporation, and that the amount due to the bank is
from individuals, and that in the event the set-off should be allowed,
it is in excess of the amount standing to the credit of William
K. Sheridan Incorporated, for the reason that after the bank had closed,
checks to the amount of \$115.00 were returned for non-payment and

charged against the amount standing to the credit of the corporation, thereby reducing it to \$2,320.04.

In *Morse on Banks and Banking*, 6th Ed. Vol. 1, Sec. 334, page 76, it is stated that "the rules of law as to the right of set-off between the bank and its depositors are not different from those applicable to other parties. The debts must be between the same parties and in the same right."

In 7th C. J. Sec. 535, page 745, it is said that "where debts are not due to it from the same persons in the same capacity, the right of set-off does not exist."

In *International Bank v. Jones*, 119 Ill. 407, the Supreme Court of this state said:

"The general rule is that a bank has the right of set-off as against a deposit, only when the individual who is both depositor and debtor, stands, in both these characters alike, in precisely the same relation, and on precisely the same footing, towards the bank, and hence an individual deposit cannot be set off against a partnership debt."

See also *People ex. rel. Nelson v. Binga State Bank*, 267 Ill. App. 183.

In the instant case, it appears that Philip H. Sheridan desired to borrow money from the Brainerd State Bank; that the bank declined to make such a loan; that his mother, Elizabeth K. Sheridan, came to the bank and individually borrowed \$15,000.00. It does not appear that either Philip H. Sheridan, Sheridan-Costello Incorporated or Sheridan Brothers Incorporated were parties to this note, or that Elizabeth K. Sheridan executed the note as an accommodation maker for the benefit of Sheridan-Costello Incorporated. It does appear that the money was deposited to the checking account of the corporation and entered upon the pass book of the corporation; that certain payments were made on said note either by Philip H. Sheridan or the corporation, and that the notes of Philip H. Sheridan were taken presumably as additional security for the loan made to his mother. We see nothing in this record which establishes any mutuality between either of these corporations and

...the amount standing to the credit of the corporation.

...reducing it to \$1,000.00.

In Woods on Banks and Banking, 8th Ed. Vol. 1, Sec. 534, page

6, it is stated that "the rule of law as to the right of set-off be-
tween the bank and its depositors are not different from its applica-
tion to other parties. The debts must be between the same parties and
be of the same right."

In 7th C. J. Sec. 830, page 745, it is said that "where debts

are not due to it from the same persons in the same capacity, the right
of set-off does not exist."

In International Bank v. Jones, 115 Ill. 407, the Supreme Court

of this state said:

"The general rule is that a bank has the right of set-
off as against a deposit, only when the individual who is both
depositor and debtor, stands, in both these characters alike,
in precisely the same relation, and on precisely the same foot-
ing, towards the bank, and hence an individual deposit cannot
be set off against a partnership debt."

See also People ex. rel. Nelson v. Nelson & Co., 207 Ill.

185.

In the instant case, it appears that Philip H. Friedman de-
posited to borrow money from the American State Bank; that the bank de-
clined to make such a loan; that his brother, Winifred K. Friedman, came
to the bank and individually borrowed \$15,000.00. It does not appear
whether Philip H. Friedman, Winifred K. Friedman incorporated or dis-
cussed with the bank the possibility of this note, or that Philip
Friedman executed the note as an accommodation maker for the benefit
of Winifred K. Friedman. It does appear that the money was
deposited to the checking account of the corporation and entered upon
the pass book of the corporation; that certain payments were made on
said note either by Philip H. Friedman or the corporation, and that the
note of Philip H. Friedman was taken reasonably as collateral security
for the loan made to his brother. It was nothing in this record which
establishes any intimacy between either of these corporations and

Elizabeth K. Sheridan. She borrowed the money for her son to be used by him in and about the business of the corporation. It is not suggested that the bank or its receiver has a right of action against the corporation on the Elizabeth K. Sheridan note. We find nothing in the record which justifies the setting off of the claim of this corporation against the claim of the receiver on the Elizabeth K. Sheridan note, therefore, the order of the Superior Court is reversed and remanded.

REVERSED AND REMANDED

WILSON and HEBEL, JJ, CONCUR.

Elizabeth J. ... The borrowed the money for her son to be used by
him in and about the business of the corporation. It is not suggested
that the bank or the receiver has a right of action against the corpora-
tion or the Elizabeth J. ... as this nothing in the record
which justifies the setting off of the claim of this corporation against
the claim of the receiver on the Elizabeth J. ... therefore,
the order of the superior court is reversed and remanded.

WILSON and ... 13, 1912.

No. 36378

LAVINA GRAY,

Appellant,

vs.

THE ESTATE OF GRACE NIXON PRICE,
Deceased,

Appellee.

APPEAL FROM

CIRCUIT COURT

273 COOK COUNTY I.A. 627²

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal by claimant from a judgment of the Circuit Court of Cook County, allowing a claim against the estate of Grace Nixon Price, deceased, for \$108.00. The cause was tried in the Circuit Court on appeal from the Probate Court of Cook County. The claim as filed in the Probate Court was for \$1,296.00, and after a hearing in that court, the entire claim was disallowed - hence the appeal to the Circuit Court.

In the beginning, it was the contention of claimant that decedent had agreed that she would pay claimant \$15.00 per month for storing certain household furniture belonging to decedent; that the goods were stored with claimant from prior to November 1st, 1913, until after November 1st, 1925, and that there was nothing due under the contract until the goods were removed in November, 1925.

It is claimed by the attorney for the Price estate that there is no proof in the record that there was any agreement or promise to pay any amount for the storage of the furniture in question; that if any such promise could be said to exist that such promise was implied and not expressed; that if implied, the entire claim, except 7 month's storage from April 12th, 1923, to November 20th, 1925, is barred by the Statute of Limitations, that no written pleas of the Statute of Limitations is necessary in this proceeding, and that the claim that the statute ceased running while Mrs. Price was out of the state of Illinois is not pertinent because she was frequently in the state after the alleged claim is alleged to have accrued.

NO. 10075
CITY, ILL.

Plaintiff,

vs.

THE STATE OF ILLINOIS
Defendant.

Complains,

278 L.A. 027

Opinion filed Feb. 7, 1934

1. The plaintiff, H. L. ...
This is an appeal by plaintiff from a judgment of the circuit court of Cook County, Illinois, entered in the estate of ...
The cause was tried in the circuit court on appeal from the probate court of Cook County. The estate was ...
The probate court was for \$1,000.00, and after a hearing in that court, the entire claim was disallowed - hence the appeal to the circuit court.
In the beginning, it was the contention of plaintiff that defendant had agreed that she would pay plaintiff \$10.00 per month for support of the household furniture belonging to defendant; that the goods were stored with plaintiff from ...
November 1st, 1933, and that there was nothing due under the contract until the goods were removed in November, 1933.
It is claimed by the plaintiff for the first estate that there is no proof in the record that there was any agreement or promise to pay any amount for the storage of the furniture in question; that if any such promise could be said to exist that such promise was implied and not expressed; that it implied, the entire claim, except 7 months' storage from April 1st, 1933, to November 1st, 1933, is barred by the statute of limitations, that no written plea of the statute of limitations is necessary in this proceeding, and that the claim that the estate is now seeking to enforce is barred by the statute of limitations is not pertinent because it was previously in the estate after the alleged claim is alleged to have occurred.

For the claimant, Foster Bronson, a brother of decedent, testified that about 1914 he shipped the furniture in question to the claimant at Bloomington, Illinois; that the goods remained with her until 1925, when they were shipped to decedent in California. A number of letters said to have been written by decedent to claimant were read in evidence. A perusal of these letters as abstracted discloses that while the furniture in question is referred to, nothing is said as to pay for its storage. The daughter of the claimant testified, over the objection of counsel representing the estate, that the decedent told the witness that she, decedent, intended to pay claimant for storing the goods in question, and that she, the witness, saw the goods at the home of claimant. This witness further testified that no amount of pay for such service was mentioned; that the floor space in claimant's home occupied by this furniture was 517 square feet, and that she, the witness, saw the decedent at claimant's home in Bloomington, Illinois, in 1927, and again in Evanston, Illinois, in 1929. In the trial, claimant seems to have abandoned the theory of a definite contract, and sought to recover the reasonable value of the service alleged to have been rendered.

The only evidence as to a reasonable charge for the alleged service, is the testimony of a storage man, who stated that \$15.00 per month, based on an estimate of 6¢ per square foot of space occupied, would be a reasonable and customary charge, but this witness on cross-examination, stated that he did not know how much space the furniture occupied. Claimant's daughter testified that a large portion of the furniture was in a room in her mother's home, formerly occupied by decedent, and that the remainder was in the attic of the house. The testimony as to what would be a reasonable charge for storage is very indefinite. There is no evidence of an express contract, and if claimant can recover at all, it must be on an implied promise to pay a monthly charge based on the testimony as to what would be a reasonable and customary charge for such services in the community where such ser-

for the plaintiff, Foster Wheeler, a brother of deceased, testified that about 1914 he advised the furniture in question in the plaintiff's home in Chicago, Illinois; that the goods remained with her until 1928, when they were shipped to deceased in Illinois. A number of letters said to have been written by deceased to plaintiff were read in evidence. A personal of these letters as abstracted discloses that while the furniture in question is referred to, nothing in said of money for the average. The daughter of the plaintiff testified, over the objection of the plaintiff, that the deceased told the witness that she, deceased, intended to pay plaintiff \$750 for the goods in question, and that she, the witness, saw the goods at the home of plaintiff. This witness further testified that no amount of pay for such services was mentioned; that the living space in plaintiff's home occupied by this furniture was \$150 a month, and that she, the witness, saw the goods at plaintiff's home in Chicago, Illinois, in 1927, and again in 1928, in 1929. In the trial, plaintiff sought to have introduced the theory of a definite contract, and sought to recover the reasonable value of the services alleged to have been rendered. The only evidence as to a reasonable charge for the alleged services, in the testimony of a store man, who stated that \$15.00 per month, based on an estimate of 64 per square foot of space occupied, would be a reasonable and customary charge, but this witness on cross-examination, stated that he did not know how much space the furniture occupied. Plaintiff's daughter testified that a large portion of the furniture was in a room in her mother's home, furniture occupied by defendant, and that the furniture was in the attic of the home. The testimony as to what would be a reasonable charge for services is very indefinite. There is no evidence of an express contract, and if plaintiff can recover at all, it must be on an implied promise to pay a monthly charge based on the testimony as to what would be a reasonable and customary charge for such services in the community where such services

vices were alleged to have been rendered. It is alleged by counsel for the estate that even if an implied contract is established, as suggested, that the Statute of Limitations began to run when each payment became due, therefore, except the amount allowed by the trial court, the claim is barred by the five year Statute of Limitations. Counsel for the claimant insists that no plea of the Statute of Limitations has been filed, further, that the decedent was out of the state during all the time before her death, when service might have been had upon her; and that, therefore, such Statute of Limitations, even if pleaded, ceased to run during that period. As to the question as to whether it was necessary to file a plea of the Statute of Limitations, we are of the opinion that the case of Bromwell v. Bromwell, 139 Ill. 424, is decisive. In that case, the Supreme Court said:

"A period of almost ten years elapsed after the last sum of money covered by the plaintiff's claim was paid over by her to her husband and before the filing of her claim in the Probate Court. If these transactions were in fact loans of money, they created an indebtedness which was evidenced by no writing, and which was therefore subject to the limitation of five years. No evidence was offered tending to take the case out of the statute, or to bring it within any of the exceptions therein contained, and the plaintiff's claim must therefore be held to have been barred by limitation nearly five years before it was filed in the Probate Court. No formal pleadings being required in the Probate Court, the Statute of Limitations applied without being specially pleaded, and under the evidence in the record, there can be no question that it constitutes a complete bar to said claim."

It is not disputed that the decedent was in the state on at least two occasions, once in 1927 and once in 1929, and on one of these occasions was at the house of the claimant. In addition to this, the evidence adduced by claimant as to the validity of her claim, is not at all convincing. We hold that all the claim except that allowed by the court, is barred by the Statute of Limitations. We see nothing in the record which would justify this court in reversing the finding and judgment of the trial court. Therefore, the judgment is affirmed.

AFFIRMED.

WILSON and HEBEL, JJ, CONCUR.

those were alleged to have been transferred. It is alleged by defendant that the estate that was in an implied contract is established, as suggested, that the Statute of Limitations began to run when each payment became due. Defendant, except the amount allowed by the trial court, the claim is alleged by the five year statute of limitations. Defendant for the claim, the Statute that no plea of the Statute of Limitations has been filed. Further, that the defendant was out of the state during all the time before his death, when services might have been had upon that, and that, therefore, such Statute of Limitations, even if pleaded, cannot be run during that period. As to the question as to whether it was necessary to file a plea of the Statute of Limitations, we are of the opinion that the case of Wheeler v. Wheeler, 100 Ill. 424, is decisive. In that case, the

Illinois Court said:

"A period of almost ten years elapsed after the last sum of money covered by the plaintiff's claim was paid over by her to her husband and before the filing of her bill in the Probate Court. If those transactions were in fact sums of money, they created an indebtedness which was evidenced by no writing, and which was therefore subject to the limitation of five years. No evidence was offered tending to take the case out of the statute, or to bring it within any of the exceptions therein contained, and the plaintiff's claim having been held to have been barred by limitation nearly five years before it was filed in the Probate Court, no formal objections being received in the Probate Court, the Statute of Limitations applied without being specially pleaded, and under the evidence in the record, there can be no question that it constitutes a complete bar to said claim."

It is not disputed that the decedent was in the state on at least two occasions, once in 1907 and once in 1909, and on one of these occasions was at the house of the plaintiff. In addition to this, the plaintiff advised by witness as to the validity of her claim, is not a controversy. It holds that all of its exceptions have allowed by the Statute, is barred by the Statute of Limitations. We see nothing in the Statute which would justify this court in reversing the finding and judgment of the trial court. Therefore, the judgment is affirmed.

AFFIRMED.

JOHN AND HENRY, JR. COUNSEL.

No. 38433

CENTRAL REPUBLIC BANK AND TRUST
COMPANY, as Trustee,

vs.

Appellee,

WILLIAM K. ROBERTS, et al,

Defendants.

On Appeal of Abraham Baer,

Appellant.

118
A
APPEAL FROM

CIRCUIT COURT

COOK COUNTY

273 I.A. 627³

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion to set aside a sale made in a proceeding brought to foreclose a mortgage on real estate, and denying a petition for leave to file a bill of review in said cause. Motion was made by the complainant to dismiss this appeal on the ground that the order appealed from is not final, which motion has been reserved to the hearing. In view of the fact that the order of the Circuit Court is affirmed, it will not be necessary to pass upon this motion.

On October 24th, 1930, complainant filed its bill to foreclose the lien of a mortgage trust deed made by the defendant, Wilmer K. Roberts and Sue D. Roberts. The parties defendant to this bill are Wilmer K. Roberts, Sue D. Roberts, Greenebaum Sons Investment Company, Frederick J. Fadner, Kathryn M. Fadner, Meyer Goldstein, Abel Davis, B. M. Winston, Murray Wolbach, M. E. Greenebaum, Eugene V.R. Thayer, John P. Oleson and Howard A. Loeb, members of a Bondholders Protective Committee. Answers to the bill were filed by persons constituting the Bondholders Protective Committee and by Greenebaum Sons Investment Company. From Baer's statement of the case, we gather that he is apparently attempting to have the court review the decree of foreclosure and ordering sale in this cause entered on November 20th, 1931, the order of September 1st, 1931, denying his petition to set aside the sale held by the Master in Chancery August 16th, 1932, and also for

leave to file a bill of review for the purpose of attacking the decree of November 20th, 1931, approving the master's report. Also, apparently, petitioner seeks to have reviewed an order entered September 22nd, 1932, confirming the master's report of sale and distribution. The order of September 22nd, 1932, authorizes the Chicago Title & Trust Company, as receiver by the terms under foreclosure, to deliver possession to Harry G. Zimmerman, and the order entered October 20th, 1932, approves the receiver's final report and account and discharges the receiver.

The record shows that on September 1st, 1932, the order appealed from was entered by G. F. Rush, Judge of the Circuit Court, as follows:

"On motion by Shulman, Shulman and Abrams, solicitors for Abraham Baer, petitioner, to set aside the sale heretofore had in this cause, and for leave to file a Bill of Review as per prayer of petition herein filed, and the court being fully advised in the premises

It is ordered that the motion and prayer of said petition be and is hereby denied.

Now comes petitioner and prays for an appeal to the Appellate Court of Illinois for the first district, which appeal is allowed upon the filing of an appeal bond in the sum of \$100.00 to be approved by the court within 10 days."

The appeal bond filed on September 2nd, 1932, indicates that the appeal herein is from this order. On September 2nd, 1932, the court entered the following order in this cause:

"This cause coming on further to be heard on the motion of the complainant to approve the Master's report of sale and distribution and upon the oral objections of the petitioner Abraham Baer in his petition heretofore presented to set aside the sale and who appealed from the denial of the relief prayed in his petition and whose objections are based on the same grounds as urged in his petition and for alleged errors apparent of record and the court having overruled the objections and approved the master's report and said petitioner now again prays for an appeal to the Appellate Court of Illinois for the first district from this order.

It is ordered that the appeal be allowed upon the filing of an appeal bond in the sum of \$5,000.00 within ten days to be approved by the court.

To the entry of this order complainant by its counsel then and there excepted.

G. F. Rush,
Judge."

to file a bill of review for the purpose of attacking the docket
of November 20th, 1933, approving the master's report. And, apparently,
petitioner seeks to have reviewed an order entered September 22nd,
1933, confirming the master's report of sale and distribution. The
order of September 22nd, 1933, authorized the Chicago Title & Trust
Company, as receiver by the terms under foreclosure, to deliver possession
to Harry G. Zimmerman, and the order entered October 20th, 1933,
approves the receiver's final report and account and discharges the
receiver.
The record shows that on September 22nd, 1933, the order entered
was entered by U. F. Smith, Judge of the District Court, as

follows:

"On motion by William, William and James, petitioners
for William, petitioners, to set aside the sale between
them and the estate, and for leave to file a bill of review
as per prayer of petitioners herein filed, and the court
being fully advised in the premises
it is ordered that the motion and prayer of said
petitioners be and is hereby denied.
Now comes petitioner and prays for an appeal to the
Appellate Court of Illinois for the first district, which
appeal is allowed upon the filing of an appeal bond in the
sum of \$100.00 to be approved by the court within 10 days.

The appeal bond filed on September 22nd, 1933, indicates that the ap-
peal herein is from this order. On September 22nd, 1933, the court

entered the following order in this cause:

"This cause coming on for trial to be heard on the
motion of the respondent to approve the master's report
of sale and distribution and upon the oral objections of
the petitioner, William, William and James, who appeared from the be-
half of the relief prayed in his petition and whose objec-
tions are based on the same grounds as urged in his petition
and for alleged errors apparent of record and the court
having overruled the objections and approved the master's
report and said petitioner now seeks for an appeal to
the Appellate Court of Illinois for the first district from
this order.

It is ordered that the appeal be allowed upon the
filing of an appeal bond in the sum of \$100.00 within ten
days to be approved by the court.
No further entry of this order complaint by the court
and then and there executed.

The appeal bond provided for in this last order was never filed, so that there is nothing before the court but the appeal from the order of September 1st, 1932, denying petitioner's motion to set aside the sale heretofore had in the said cause, and for leave to file the petition set forth in the abstract and referred to as a bill of review.

It is urged by counsel for complainant that the record does not disclose that Abraham Baer, upon whose motion the court was asked to set aside the sale, has any interest in this proceeding. A careful examination of the portion of the record pertinent to this inquiry, including the motion and petition sought to be filed, shows that there is not a suggestion there that Baer has any interest in this proceeding.

Therefore, the order of the Circuit Court is affirmed.

AFFIRMED.

WILSON and HEBEL, JJ, CONCUR.

It is urged by counsel for complainant that the record does not disclose that Graham Deal, upon whose motion the court was asked to set aside the sale, is a party interested in this proceeding. A material examination of the petition of the record pertinent to this finding, including the motion and petition sought to be filed, shows that there is not a suggestion there that there is any interest in this proceeding.

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36444

WALTER W. LEAHY,

(Plaintiff) Appellee,

v.

OTTO C. KRAEMER,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 627¹⁴

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court of Chicago for \$3,195.00, entered in an action in assumpsit, brought by plaintiff against defendant. The suit is upon a written instrument, by which defendant guaranteed the payment of certain bonds which were further secured by a mortgage trust deed on real estate. The trial was by the court without a jury.

It is not disputed that the bonds in question had matured by reason of an accelerating agreement in the trust deed, and the defense is that inasmuch as plaintiff, the owner of a small portion of the bond issue, acquired them after maturity, that, therefore, he took them subject to a defense which defendant claims to have against Greenebaum Sons Investment Company, the original owner of the bonds in question. After the bonds had matured Greenebaum Sons Investment Company entered into an agreement with the defendant referred to, by the terms of which defendant was to be indemnified and protected from any liability upon the bonds in question, and it is upon this agreement that the defense is predicated, such agreement being as follows:

"Whereas, heretofore, to-wit: the said Kraemer entered into a certain guaranty agreement with the Investment Company, in and by the terms of which it was recited that Kraemer Building Corporation, a corporation, has executed its bonds in the sum of One Million Three Hundred Thousand Dollars (\$1,300,000) and that in consideration of the said Investment Company purchasing said bonds, the said Kraemer agreed to guarantee the prompt payment of said bonds mentioned in and described in that certain deed of trust made by Kraemer Building Corporation to Greenebaum Sons Bank and Trust Company, and recorded in the Office of the Recorder of Deeds of Cook County, Illinois as Document No. 9107822; and

WILLIAM J. BERRY,

(Plaintiff) Respondent,

v.

WILLIAM J. BERRY,

(Defendant) Respondent.

Opinion filed Feb. 7, 1934

MR. JUSTICE BRIDGES delivered the opinion of the court.
 This is an appeal from a judgment of the Circuit Court of Chicago for \$1,165.00, entered in an action in contract, brought by plaintiff against defendant. The suit is upon a written contract, by which defendant guaranteed the payment of certain bonds which were further secured by a mortgage trust deed on real estate. The trial was by the court without a jury.

It is not disputed that the bonds in question had matured by reason of an accelerating agreement in the trust deed, and the defense is that income tax withheld, the owner of a small portion of the bond issue, retained them after maturity, that, therefore, he took them subject to a demand upon defendant claiming to have retained them. Defendant does not dispute the original order of the bonds in question. After the bonds had matured defendant does not dispute having entered into an agreement with the defendant referred to, by the terms of which defendant was to be indemnified and protected from any liability upon the bonds in question, and it is upon this agreement that the defense is predicated, such agreement being as follows:

"Whereas, hereinafter, to-wit: the said plaintiff entered into a certain contract agreement with the defendant whereby, in and by the terms of which it was recited that the defendant, being a corporation, a corporation, has executed the bonds to the sum of two million three hundred thousand dollars (\$2,300,000) and that in consideration of the said plaintiff's agreement to purchase said bonds, the said plaintiff agreed to guarantee the payment of said bonds, and in and therefor in that certain deed of trust made by the said plaintiff corporation to the said defendant, and that the said plaintiff, and recorded in the office of the Recorder of Deeds of Cook County, Illinois, as Document No. 180,000; and

2231A.037
 1844
 WILLIAM J. BERRY
 (Plaintiff) Respondent

Whereas at the time of the execution of said guaranty and trust deed above mentioned, the said Kraemer Building Corporation also executed its principal note for Three Hundred Forty Thousand Dollars (\$340,000.00) payable to the order of itself and secured the same by a trust deed from it to W. Ernest Greenebaum, Jr., as Trustee, which said trust deed is recorded in the Recorder's office of Cook County, Illinois, as Document No. 910823; and

Whereas default has been made in the payment of the amounts due under both of said trust deeds and a foreclosure proceedings has been instituted by W. Ernest Greenebaum, Jr., as Trustee, to foreclose said trust deed securing said note for Three Hundred Forty Thousand Dollars (\$340,000.00); and

Whereas it is proposed by said Kraemer that he will cause the Kraemer Building Corporation to deed the property described in the trust deed above mentioned to Greenebaum Sons Investment Company, or to its nominee, in satisfaction of said trust deed securing said note for Three Hundred Forty Thousand Dollars (\$340,000.00). Provided, However, that the said Investment Company will hereafter hold and save harmless the said Kraemer upon his said guaranty for the payment of said bonds and interest coupons secured by said trust deed and recorded in the Recorder's Office of Cook County, Illinois, as Document No. 9107822; and

Whereas said proposition has been accepted by said Investment Company and said Kraemer Building Corporation is about to, or has transferred said real estate to Charles A. Pfingsten, the nominee of said Investment Company.

Now, Therefore, in consideration of the premises: the said Investment Company hereby agrees to and with the said Kraemer that it will hold the said Kraemer harmless from any and all liability, costs and charges to which he may be liable or subject, growing out of or on account of the execution by said Kraemer to said Investment Company of the said guaranty agreement dated November 20, 1928, a copy of which said guaranty agreement is hereto attached, marked, 'Exhibit A' and by reference made a part hereof.

In Witness Whereof, the said Greenebaum Sons Investment Company has caused these presents to be executed on its corporate name by its Vice President, attested by its Secretary and its corporate seal to be hereto attached, the day and year first above written. (Italics ours)

GREENEBaum SONS INVESTMENT COMPANY,
By (Signed) W. E. Greenebaum, Jr.,
Its Vice President.

(Seal)
Attest:

(Signed) Joseph G. Straus,
Its Asst. Secretary."

It is stipulated that the following agreement appears on the bonds, upon which this action is brought, and is signed by the defendant:

"The prompt payment of the within bond, and the interest thereon, when due, and at all times thereafter, has been guaranteed by Otto C. Kraemer by an agreement of guaranty, bearing even date with the within bond, duly executed by him and deposited with Greenebaum Sons Investment Company, for

the benefit of the holder of the within bond."

It will be noted that the agreement between Greenebaum Sons Investment Company and the defendant is not that the defendant will be discharged from any liability on the bonds, but that Greenebaum Sons Investment Company "will hold the said Kraemer harmless from any and all liability, costs and charges to which he may be liable or subject, growing out of or on account of the execution of said Kraemer to said investment company of the said guaranty agreement dated November 20th, 1926." (Italics ours) All this agreement amounts to is that if Kraemer is compelled to pay, then and in that case Greenebaum Sons Investment Company will indemnify him.

In our opinion, this agreement has no effect on plaintiff's right to maintain the action in question, whether he acquired the bonds before or after they matured. In view of this holding, it will not be necessary for this court to pass upon the other questions raised by defendant. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON, AND WEBER, JJ. CONCUR.

The benefit of the holder of the stock.

It will be noted that the agreement between the parties

some investment company and the holder of the stock, but the agreement will be dissolved from any liability on the stock, but the company

some investment company will have the right to recover

from any and all liability, and the company will be liable

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36473

ARTNA ACCEPTANCE COMPANY, a
corporation,

Defendant in Error,

v.

S. H. DAVIS, trading as DAVIS MOTOR
SALES,

Plaintiff in Error.

190
H
ERROR TO

CIRCUIT COURT

COOK COUNTY.

273 I.A. 628¹

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court of Cook County against defendant for the sum of \$1,000.00 entered in an action in trover, brought by plaintiff to recover the value of an automobile, which it is alleged defendant wrongfully converted. The trial was by the court without a jury.

To the declaration filed in the case, defendant filed a plea of the general issue and a special plea alleging his discharge in bankruptcy. To these pleas, plaintiff filed replications, in which it is alleged that the cause of action by plaintiff is predicated upon the charge of wilful and malicious injury to the plaintiff, and that the claim was created by fraud, misappropriation and embezzlement; that the plaintiff on July 10th, 1929, was the owner of an Auburn Sport Sedan, and on that day delivered it to the defendant under a series of documents known as a "floor plan" arrangement, providing that the title was retained in the plaintiff until the full sum of \$1,181.87 should be paid by the defendant to the plaintiff; that the automobile should continue in the possession of the defendant until released from the floor plan arrangement, or removed by the plaintiff, and that said property should be returned to the plaintiff on demand; that the plaintiff should not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the property, except on written order

defendant
12-1-24

THE DISTRICT COURT, D. C.

Washington, D. C.

v.

E. M. BERRY, Plaintiff, vs. JAMES H. BERRY, Defendant.

Plaintiff's Motion.

Opinion filed Feb. 7, 1934

MR. JUSTICE BRIDGES: This case arises out of the will of the late

This is an appeal from a judgment of the District Court

of Cook County against defendant for the sum of \$1,000.00 interest

in an action is brought by plaintiff to recover the value

of an automobile, which it is alleged defendant wrongfully converted.

The trial was by the court alone - jury.

To the facts as stated in the bill, defendant filed a

plea of the general issue and a special plea denying the charge

in bankruptcy. To these pleas, plaintiff filed replies, in

which it is alleged that the same are untrue and that plaintiff is entitled

upon the charge of willful and malicious injury to the plaintiff, and

that the claim was created by fraud, misrepresentation and concealment;

that the plaintiff on July 1, 1928, was the owner of an automobile

which was on that day delivered to the defendant under a

series of documents known as a "floor plan agreement," providing

that the title was retained in the plaintiff until the full sum of

\$1,181.17 should be paid by the defendant to the plaintiff; that the

automobile should continue in the possession of the defendant until

released from the floor plan agreement, or removed by the plaintiff;

and that said agreement should be returned to the plaintiff as demanded;

that the plaintiff should not sell, lease, rent, deliver, mortgage,

pledge or otherwise dispose of the property, except as written under

[Handwritten signature and notes at bottom of page]

from the plaintiff releasing the same upon payment to plaintiff of the amount stipulated in the agreement; that notwithstanding said written agreements, the defendant, without the knowledge or consent of the plaintiff, without obtaining any release, and without paying the above sum of money, and in violation of the defendant's duties as bailee and trustee, some time subsequent to July 10th, 1929, sold, disposed of, and converted the property to his own use, and the proceeds of the sale thereof.

The defendant was in the business of dealing in automobiles in Oak Park under the name of Davis Motor Sales, and plaintiff was in the business of financing automobile dealers. On July 10th, 1929, defendant, as Davis Motor Sales by R. H. Davis, executed and delivered to plaintiff a chattel mortgage on an Auburn Sport Sedan, serial No. 27976808, motor No. 25943, to secure the payment on a note of that date for \$1181.87. Also on the same date defendant gave to plaintiff what is referred to in the abstract as a trust receipt signed "Davis Motor Sales, by R. H. Davis", by which the receipt of the automobile described is acknowledged and by which the maker agreed to hold the automobile as the property of the Aetna Acceptance Company, for the purpose of storing the same, and agreed to keep it new and not to operate it for demonstration or otherwise, and to return the property to the Aetna Acceptance Company on demand. Also, by the terms of this agreement, it is agreed that the maker would not sell, loan, rent, deliver, mortgage, pledge or otherwise dispose of the automobile to any other person except upon the written order from the Aetna Acceptance Company for release from trust, upon payment to the company of the amount required by the order upon the endorsement on the back of this so-called trust receipt of a release from the trust alleged to have been created thereby. Also, there was delivered at the same time to the plaintiff a bill of sale dated July 19th, 1929, executed by Davis Motor Sales, by R. H. Davis, defendant, by which the automobile in question was conveyed to the plaintiff.

from the plaintiff regarding the same upon payment to plaintiff of
the amount stipulated in the agreement; that notwithstanding said
written agreement, the defendant, without the knowledge or consent
of the plaintiff, without obtaining my release, and without paying
the above sum of money, and in violation of the defendant's duties
as bailee and trustee, some time subsequent to July 1935, 1936,
sold, disposed of, and converted the property to his own use, and
the proceeds of the sale thereof.
The defendant was in the business of dealing in automobiles
also in Oak Park under the name of Davis Motor Sales, and plaintiff
was in the business of financing automobile dealers. On July 1935,
1936, defendant, as Davis Motor Sales by J. D. Davis, executed
and delivered to plaintiff a certain mortgage on an automobile
certain, serial No. 19878000, motor No. 10000, in return for payment
on a note of that date for \$111.17. Also on the same date defendant
gave to plaintiff that is referred to in the abstract as a trust
receipt signed "Davis Motor Sales, by J. D. Davis," by which the
transfer of the automobile described is acknowledged and by which the
seller agreed to hold the automobile as the property of the latter
respective company, for the purpose of holding the same, and agreed
to keep it new and not to convert it for transportation or delivery,
and to restore the property to the latter company company as desired.
Also, by the terms of this agreement, it is agreed that the latter
would not sell, loan, rent, deliver, mortgage, pledge or otherwise
dispose of the automobile to any other person except upon the written
order from the latter company company but release from trust,
upon payment to the company of the amount required by the latter
upon the endorsement on the back of this so-called trust receipt
of a release from the trust alleged to have been received company.
Also, there was delivered to the same date to the plaintiff a bill
of sale dated July 1935, 1936, executed by Davis Motor Sales, by
J. D. Davis, defendant, by which the automobile in question was

The trial was by the court without a jury, and after considering the evidence, the court entered the following findings:

"The Court finds that the defendant was not actuated by any wilful or criminal intent in disposing of the car in question."

"The Court finds Robert H. Davis guilty of legal conversion of the property of the plaintiff as described in the count in trover heretofore filed herein."

"The Court finds that the defendant in this case was not actuated by any wilful, malicious or criminal intent in disposing of the car in question."

"The Court finds the defendant guilty of conversion."

Thereupon the court entered judgment in trover against defendant, and in and by such judgment assessed the plaintiff damages in the sum of \$1,000.00 and costs of the suit. Defendant excepted to the entry of this judgment, and from this judgment the appeal herein was prayed and allowed.

The defendant urges as grounds for reversal that the alleged conversion of the car in question was not actuated by any wilful, malicious or criminal intent; that the claim of plaintiff against defendant was provable in bankruptcy, and that defendant's discharge in bankruptcy which was proven, acted as a discharge of the claim upon which the action herein is based. It is further contended by the defendant that he had the right to sell the car in question and apply the proceeds in payment of an amount alleged to be due from plaintiff to defendant in the sum of \$1,238.40.

As to whether or not there must be a showing of malice or wrongful intent upon which to predicate an action in trover, this court in Gagneau v. Benia, 35 Ill. App. 37, said:

"A wrongful intent is not an essential element of the conversion. It is enough in this action, that the rightful owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it. Boyce v. Brookway, 31 N. Y. 490. A very slight agency or interference will make one liable in trover. Farrer v. Chauffetete, 5 Denio, 527; see Follett v. Edwards, 30 Ill. App. 386, and cases there cited."

It is apparent from the various agreements made between the parties that the plaintiff retained all title, dominion and control over this automobile, that the defendant had no right to sell it without plaintiff's consent, and that he was guilty of wrongful conversion when he did so. After defendant sold this automobile, he filed a voluntary petition in bankruptcy and scheduled the claim of plaintiff made herein as a debt owed to plaintiff. Defendant was discharged in the bankruptcy proceeding, and now insists that such discharge is a bar to this proceeding. In Lester v. Southern Security Co., 147 S. E. Rep. 529, the court said:

"A creditor having a debt secured by title to property, where his debtor is adjudged a voluntary bankrupt, can, if he does not prove his debt in the bankruptcy court, institute an action in trover for the recovery of such property, and is entitled to obtain a money judgment against his debtor for the value of the property sued for, as against the plea of discharge in bankruptcy.

This court holds that this claim against defendant was not affected by defendant's discharge in bankruptcy. The judgment is, therefore, affirmed.

AFFIRMED.

WILSON AND HEBEL, JJ. CONCUR.

36507

CENTRAL REPUBLIC BANK AND TRUST
COMPANY, as Trustee,

Complainant-appellant,

and

LOTT HOTELS, INCORPORATED,

Defendant - Appellant,

v.

JOSEPH F. CONNERY, Receiver,

Appellee.

1217
APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

273 I.A. 628²

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The appeal in this case involves the same parties, the same properties and the same questions as are involved in case No. 36506, and the decision there is decisive here. Therefore, the cause is reversed and remanded for the reasons stated in case No. 36506, and with directions to enter the same order as in No. 36506.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, J., and HEBEL, J. CONCUR.

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Journal of the American Medical Association

2000

Opinion filed Feb. 7, 1934

will, however, be left to your own discretion as to how you wish to proceed.

NAME OF REVIEWER: _____ DATE OF REVIEW: _____

100% of the total population of the country.

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1. The first of these is the fact that the majority of the population of the United States is now living in urban areas. This is a result of the process of urbanization, which has been going on since the beginning of the 20th century. The population of the United States has increased from about 100 million in 1900 to over 200 million in 1950, and the majority of this increase has been in urban areas. This has led to a concentration of population in a few large cities, which has in turn led to a number of problems, such as overcrowding, pollution, and traffic congestion.

36508

CENTRAL REPUBLIC BANK AND TRUST
COMPANY, as Trustee,

Complainant-Appellant,

and

LOTT HOTELS, INCORPORATED,

Defendant-Appellant,

v.

JOSEPH F. CONNERY, Receiver,

Appellee.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

273 I.A. 628³

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The appeal in this case involves the same parties, the same properties and the same questions as are involved in case No. 36506, and the decision there is decisive here. Therefore, the cause is reversed and remanded for the reasons stated in case No. 36506. and with directions to enter the same order as in No. 36506.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND NEBEL, JJ. CONCUR.

20270

UNITED STATES DEPARTMENT OF JUSTICE
DIVISION OF INVESTIGATION

MEMORANDUM FOR THE DIRECTOR

RE:

JOHN EDGAR HOOVER

INTERNAL SECURITY - RACIAL

W.

JOHN F. CONNELLY, Director

Enclosed

Opinion filed Feb. 7, 1934

RE: PENDING MATTER AND MATTER OF THE COURT OF APPEALS.
The report in this case involves the same person, and
when compared and the same conclusion is the result of the
NO. 12300, and the decision made in this case. Therefore, the
case is referred and reviewed for the reasons stated in the
above, and also attention is called to the fact that in the
above.

REVIEWED BY DIVISION OF INVESTIGATION

FILED AND INDEXED BY DIVISION

36509

CENTRAL REPUBLIC BANK AND TRUST
COMPANY, as Trustee,

Complainant-Appellant,

and

LOFT HOTELS, INCORPORATED,

Defendant-Appellant,

v.

JOSEPH F. CONNERY, Receiver,

Appellee.

APPEAL FROM

CIRCUIT COURT

BOCK COUNTY.

2731.A.628⁴

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

The appeal in this case involves the same parties, the same properties and the same questions as are involved in case No. 36506, and the decision there is decisive here. Therefore, the cause is reversed and remanded for the reasons stated in case No. 36506, and with directions to enter the same order as in No. 36506.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON AND REBEL, JJ. CONCUR.

173

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1. *Journal of Management Education* 24(1): 10-12

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1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 2679, 26

Opinion filed Feb. 7, 1934

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36938

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

v.

JOSEPH KANSKI, et al,

Plaintiffs in Error.

1227
ERROR TO ORIGINAL

COURT OF

COOK COUNTY.

273 I.A. 628⁵

Opinion filed Feb. 7, 1934

MR. PRESIDING JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this writ of error, Joseph Kanski and Stanley Zurek, plaintiffs in error, seek to have a finding and judgment of the Criminal Court of Cook County reversed in and by which each of the defendants was judged to be guilty of the crime of kidnaping, as charged in an indictment against them. They were found to be of the age of 19 and 20 years respectively, and each was sentenced to the Illinois Reformatory at Pontiac for a term of years, not less than one nor more than five. In other words, an indefinite or indeterminate sentence. The hearing was by the court without a jury.

The indictment consisted of three counts, and charges that Joseph Kanski and Stanley Zurek on May 1st, 1932, in Cook County, did unlawfully, wilfully and without lawful authority, forcibly and secretly confine and imprison within the state Wylma Sharr against her will; did forcibly seize and confine Wylma Sharr with intent to cause her to be secretly confined and imprisoned within the state against her will; did inveigle and kidnap Wylma Sharr with intent to cause her to be secretly confined and imprisoned within the state against her will.

The statute under which defendants were indicted and convicted, Cahill's Illinois Revised Statutes, 1933, Chap. 38, Par. 377, provides:

"Whoever wilfully and without lawful authority forcibly or secretly confines or imprisons any other person within this State against his will, or forcibly carries or sends such person out of the State, or forcibly seizes or confines, or inveigles, or kidnaps any other person, with

THE PEOPLE OF THE STATE OF ILLINOIS,

Defendant in Error,

v.

JOSEPH LAMAKI, et al.,

Plaintiffs in Error.

273 I.A. 628

Opinion filed Feb. 7, 1934

MR. JUSTICE JUSTICE WILL DELIVER THE OPINION IN THE COURT.
 By this writ of error, Joseph Lamaki and Stanley Wysz, plaintiffs in error, seek to have the finding and judgment of the Criminal Court of Cook County reversed in and by which each of the defendants was found to be guilty of the crime of kidnapping, as charged in an indictment against them. They were found to be of the age of 19 and 20 years respectively, and each was sentenced to the Illinois Reformatory at Joliet for a term of years, not less than one nor more than five. In other words, an indefinite or indeterminate sentence. The hearing was by the court without a jury.

The indictment consisted of three counts, and charges that Joseph Lamaki and Stanley Wysz on May 1st, 1932, in Cook County, did unlawfully, wilfully and without lawful authority, forcibly and secretly confine and imprison within the state of Illinois against her will; did forcibly seize and confine within the state of Illinois against her will; did unlawfully and kidnap within the state of Illinois against her will; did unlawfully and kidnap within the state of Illinois against her will; did unlawfully and kidnap within the state of Illinois against her will.

The statute under which defendants were indicted and convicted, Illinois Revised Statutes, 1931, Chap. 38, Sec. 277, provides:

"Whoever unlawfully and without lawful authority forcibly or secretly confines or imprisons any other person within this State against his will, or forcibly seizes or kidnaps such person out of the State, or forcibly seizes or confines, or imprisons, or kidnaps any other person, with

the intent to cause such person to be secretly confined or imprisoned in this State against his will, or to cause such person to be sent out of the State against his will, shall be imprisoned in the penitentiary for a term of not less than one year and not exceeding five years, or fined not exceeding \$1,000.00 or both. * * *

It is the contention of defendants that the trial court was in error in that no definite term of imprisonment was fixed by the judgment that the judgment should, therefore, be reversed, and they cite Cahill's Illinois Revised Statutes, 1933, Chap. 38, Par. 735, as authority, as follows:

"Sec. 1. That in all cases where any person, male or female, over ten years of age, shall be charged with either of the offenses of misprison of treason, murder, rape or kidnaping, and the case shall be tried by a jury, and the jury shall find the defendant guilty, the jury shall also by its verdict fix the punishment, and if the punishment imposed is imprisonment, the jury shall fix the term of such imprisonment; if the case is tried by the court, without a jury, or on a plea of guilty, and the court shall impose imprisonment as the punishment, the court shall fix a definite term of imprisonment, and the court in such case, shall fix the place of confinement. In every such case of imprisonment, the court shall sentence the defendant to the penitentiary, except as is provided in classes one and two in section three of this Act, and in such cases the court may, in its discretion, commit as in these clauses provided. Every person so sentenced shall be held in the appropriate institution, that is to say, the Illinois State Penitentiary or the State Reformatory for women, for an during the definite term in said sentence named, subject to parole and subject to be earlier discharged, as in this Act provided, by the Department of Public Welfare, and it shall be deemed and taken as a part of every such sentence that all of the provisions for parole and discharge in this Act contained shall be a part of said sentence as fully as though written in it.

Every person sentenced and committed under this section 'one' shall, in the discretion of the Department of Public Welfare, be eligible to parole under rules and regulations adopted therefor by the Department of Public Welfare, such paroles to be as follows: Persons sentenced for life may be eligible for parole at the end of twenty years; persons not sentenced for life but sentenced for a definite term of years shall not be eligible to parole until he or she shall have served the minimum sentence provided by law for the crime of which he or she was convicted, good time being allowed as provided by law; nor until he or she shall have served at least one third of the time fixed in said definite sentence. It is expressly provided that the definite sentence provided for in this section 'one' shall be applicable only to the crimes enumerated in this section 'one' and definite sentences shall not be applicable to any other crime or offense enumerated in this Act; and further, that indeterminate in general

The following information was obtained from the records of the
 New York City Police Department, New York City, New York, on
 June 1, 1964, in connection with the investigation of the
 case of the disappearance of the body of the late
 John F. Kennedy, President of the United States, who was
 shot on November 22, 1963, in Dallas, Texas.

It is the contention of the Government that the trial would be a violation of the Constitution and that the Government has no right to bring such a case against the President.

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sentences shall apply to all other crimes and offenses enumerated in this Act, but not to the crimes or offenses enumerated in this section 'one'. (Italics ours)

By this Act it is very definitely provided that upon one being found guilty of kidnapping, and "if the punishment imposed is imprisonment" that "a definite term of imprisonment" shall be fixed, and there is no distinction in this regard made in the Act between the different kinds of kidnapping there defined.

Counsel for the state cite the case of People v. Gold, 343 Ill. 402, as authority for the proposition that the crime charged here, and of which defendants were found guilty, is "common law kidnapping", and that the indefinite sentence imposed in the case at bar was proper. In the case cited, Gold and four others were indicted for the crime of kidnapping for ransom, a separate ^{and} distinct crime from that for which defendants ^{here} were indicted and convicted. The jury in the Gold case found defendants guilty of "kidnapping for ransom in the manner and form as charged in the indictment." It was there insisted by plaintiffs in error in the Supreme Court that the verdict as quoted above "was only a finding of guilty of kidnapping, there being no finding that there was a purpose or intent to extort ransom from the persons kidnapped as charged in the indictment." The court distinguished between the two definitions of kidnapping, and held that the verdict was proper. It did not pass upon the question raised here.

In People v. Wood, 316 Ill. 388, the defendant was found guilty of incest. The question involved was in effect the same as is raised here, and the Supreme Court said:

"The verdict found plaintiff in error 'guilty of incest in manner and form as charged in the indictment. The crime with which plaintiff in error was charged is that defined by section 156 of the Criminal Code, and the punishment fixed by that section for its violation is imprisonment in the penitentiary for a term of not less than one year and not exceeding twenty years. The judgment entered in this case does not sentence plaintiff in error to imprisonment in the

Southern Illinois Penitentiary or in any other penal institution in the State of Illinois. It merely directs the sheriff to deliver the prisoner to the warden of the penitentiary at Chester and commands the warden to confine the prisoner in safe and secure custody. This is not sufficient. The judgment must definitely fix the place of imprisonment and the place must be one fixed by law. The judgment not only fails to fix the place of imprisonment but it does not in any manner fix the term of imprisonment. By virtue of the provisions of the act of 1917 in relation to the sentence of persons convicted of crime, the judgment of the court should have been a general sentence of imprisonment in the Southern Illinois Penitentiary for a term not exceeding twenty years. (Smith's Dist. 1933, p. 739). The term fixed by the section of the Criminal Code relating to the crime of which the prisoner stands convicted is read into every judgment, but it is necessary to state in the judgment the name of the crime, or so describe it that it can be identified by the warden. In the case of incest, there are two sections of the Criminal Code describing two different crimes and each fixing a different term of imprisonment. Plaintiff in error stands convicted of cohabiting with his own daughter, and that is the crime that must be described in the judgment so that the punishment fixed for that offense will be taken as a part of the sentence, whether written in the judgment or not.

Plaintiff in error having been accorded a full, fair and impartial trial upon which no errors of law intervened and a legal verdict having been returned against him, he is not entitled to another trial merely because of the error committed by the court in entering judgment. (People v. Boer, 352 Ill. 154; People v. Hardin, 355 id. 9; Callage v. People, 159 id. 445.) When the circuit court shall have entered a proper judgment no reversible error will remain in the record.

The judgment is reversed and the cause is remanded to the circuit court of Pulaski county with leave to the State's attorney to move the court for the entry of a proper judgment upon the verdict and with directions to the court to allow such motion and re-sentence plaintiff in error." (Italics ours)

We hold that the trial court here was in error in not fixing a definite term of imprisonment.

The judgment is, therefore, reversed and remanded with the direction to the trial court to re-sentence defendants for a definite term, as provided by statute.

REVERSED AND REMANDED WITH DIRECTIONS.

WILSON, AND NEBEL, JJ. CONCUR.

36526

ROBERT W. RIEBY,

Appellee,

v.

HEALTH-MOR SANITATION SYSTEMS,
INC., a Corporation,

Appellant.

123
APPEAL FROM

7
MUNICIPAL COURT

OF CHICAGO.

273 I.A. 628^b

Opinion filed Feb. 7, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals to this court from a judgment for \$365.30 entered upon a finding for the plaintiff by the court upon a trial without a jury, the action being a fourth class contract case in the Municipal Court of Chicago.

The action by the plaintiff is upon a claim for commissions alleged to have been earned on sales made by the defendant to a customer (The Bowman Dairy Company) solicited by plaintiff as sales agent for the defendant. The defendant denied that the plaintiff was its sales agent.

The plaintiff entered into a contract with the defendant on November 15, 1930, and the defendant contends that the legal effect of the written contract is that the plaintiff was an independent dealer with non-exclusive territory privileges, having the right to buy and sell the defendant's vacuum cleaners, and that as an independent dealer the plaintiff, in common with all other dealers, was entitled to a profit or discount only on goods purchased by him from the defendant.

This court is not aided by a brief of the plaintiff stating his side of the controversy.

The contract provided that the defendant agreed to sell and deliver to the plaintiff its Sanitation System at its regular wholesale price, and reserved the right to make deliveries upon consignment. The plaintiff was to give his full time to the business, and to sell

• 1994

Opinion filed Feb. 7, 1934

THE COURT OF APPEALS IN THE DISTRICT OF COLUMBIA, D.C., has affirmed the judgment of the District Court of the District of Columbia, in the case of the United States vs. the District of Columbia, No. 10,000, decided on the 10th day of June, 1901.

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the cleaners for cash, or upon time payments on terms prescribed by the defendant; and the plaintiff was to pay for the cleaners purchased by him by turning over to the defendant all conditional sales contracts, used cleaners and cash received by the plaintiff from his customers. The plaintiff was allowed a discount of 20% and an additional discount of 15% on cash received, and 10% on account of installment payments as long as he remained a dealer.

The plaintiff demonstrated defendant's cleaners at the Bowman Dairy Company plant, and the Purchasing Agent of the Company, Roy W. Merrill, told the plaintiff to return on March 10, following the demonstration of the cleaner, for an order. In the meantime Lawrence DePaul, who was also operating under contract with the defendant company, sold the System, so-called, to the Bowman Dairy Company for cash.

There is evidence that the plaintiff informed one Tarbell and Frank Callahan, officials of the defendant company, that the plaintiff had an appointment with Merrill of the Bowman Dairy Company, and that he was going to give plaintiff an order.

The sale made by DePaul to the Dairy Company was not recorded in the defendant's books as being sold to the Dairy Company. There is evidence by DePaul, the salesman who closed the deal, that he received information from one Moser that he, DePaul, could make a sale to Merrill of the Dairy Company if he would call. The ticket covering the sale was made out and listed in Merrill's name. The issue is: Was the defendant liable to the plaintiff under the facts? The court heard the evidence. There is conflict in the testimony, and apparently, the court, in determining the issues, took into consideration the veracity and credibility of the witnesses. This

the witness for each of whom the witness on cross-examination
by the defendant; and the witness was in the witness
stand by him by the witness; all of which
witness testimony, each witness and each testimony by the witness
from his own knowledge. The witness was witness a witness to the fact
an additional witness at the same time, and the witness was witness
of material testimony as to the fact of the witness's testimony.

The witness testified that the witness's testimony of the
witness being witness (and the witness's testimony of the witness)
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testimony is the witness, but in order, in the witness's
testimony, and was also witness under oath with the
defendant's testimony, and the witness, as the witness being
witness for each.

There is evidence that the witness's testimony and the witness
and the witness's testimony of the witness's testimony, that the
witness has an agreement with the witness of the witness's testimony,
and that he was going to give the witness's testimony.

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court will not reverse a judgment unless it is entered against the manifest weight of the evidence, and it is our opinion that the finding for the plaintiff is sustained by facts as they appear in the record, except as to the amount of damages.

The evidence as to the amount of damages sustained by the plaintiff, is that DePaul, agent of the defendant company, sold two vacuum cleaners and received \$38.14 for his services, and this is corroborated by Roy W. Merrill, Purchasing Agent for the Bowman Dairy Company, who testified that the Dairy Company purchased two vacuum cleaners, and that none were subsequently purchased by him for the Company.

There is some evidence offered by the plaintiff that the defendant's agent Jones, an instructor whose duty it was to instruct men of the defendant company in its method of selling its product, in his talks to the men, spoke of seventeen systems having been sold to the Bowman Dairy Company. The amount of the commission on sales received by DePaul is certain, and in the opinion of this court, upon the record, the plaintiff was entitled to a judgment for \$38.14; that the trial court was in error in entering judgment against the defendant for \$365.30 and if the plaintiff had appeared in this court upon a remittitur of \$337.16 the judgment would have been affirmed for \$38.14. However, upon this record the judgment is reversed and the cause remanded.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

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The following are the names of the persons who were present at the trial:

[The remainder of the page contains faint, illegible handwritten or typed notes.]

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36536

PEOPLE OF THE STATE OF ILLINOIS,
for use of ABRAHAM W. PATEK,

Appellee,

v.

HENRY BLECH, HERMAN HERSON and
MARYLAND CASUALTY COMPANY,

Appellants.

129 77
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 6287

Opinion filed Feb. 7, 1934

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

Defendants appeal from a judgment of \$225 entered by the court upon a hearing without a jury in an action in the Municipal Court of Chicago, on an attachment bond in aid of a suit then pending, which bond was executed by the defendants.

The action of the plaintiff is upon the bond given in the attachment proceedings signed by Henry Blech, Herman Herson and Maryland Casualty Company, as surety. The plaintiff alleges that the court upon a proceeding quashed the attachment on July 8, 1932, and after a hearing in the instant case entered the judgment appealed from.

The defendants contend that the attachment bond, the subject of the suit, was not introduced in evidence, and as a result the finding of the court was contrary to the evidence. It does not appear that the attachment bond was offered by the plaintiff and received in evidence.

It is admitted by the defendants Blech and Herson in their affidavit of merits that the attachment was quashed, but in order to establish a prima facie case and to enable the court, from the evidence, to enter a proper finding, it was necessary, in addition to this admission in the affidavit of merits, that the bond in question be offered and received in evidence. Roberts v. Garen,

STATE OF NEW YORK
IN SENATE
JANUARY 1, 1934

REPORT

REPORT OF THE
COMMISSIONER OF THE
DEPARTMENT OF SOCIAL WELFARE

2731A-588

Opinion filed Feb. 7, 1934

THE COURT IN THIS CASE, DECIDING THE MATTER ON THE POINT
PRESENTED, HAS REACHED THE CONCLUSION THAT THE
EVIDENCE ADDUCED IN THIS CASE IS NOT SUFFICIENT TO
SUPPORT THE VERDICT OF THE JURY. THE COURT THEREFORE
REVERSES THE VERDICT OF THE JURY, AND GRANTS A
NEW TRIAL.

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SUPPORT THE VERDICT OF THE JURY. THE COURT THEREFORE
REVERSES THE VERDICT OF THE JURY, AND GRANTS A
NEW TRIAL.

IT IS ORDERED BY THE COURT THAT THE VERDICT BE
REVERSED, AND THAT A NEW TRIAL BE GRANTED. THE
COSTS OF THIS ACTION BE PAID BY THE DEFENDANT.
JUDGES: ...

1 Scammon, 396; Wise, et al v. Chaney, 1 Gilman, 562.

The plaintiff having failed to offer the attachment bond in evidence, the trial court erred in its finding and the judgment for the plaintiff was erroneously entered. The question is properly before this court by the defendants' assignment of error that "the finding of the court is contrary to the evidence." The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

HALL, P. J. AND WILSON, J. CONCUR.

1 to 1000, 1000; 1000 v. 1000, 1000, 1000.

The plaintiff having failed to show the defendant was in evidence, the trial court erred in the finding and the judgment for the plaintiff was accordingly reversed. The court in its properly before this court by the defendant's motion and error that "the finding of the court is contrary to the evidence." The finding is therefore reversed and the cause remanded.

REVEREND AND HONORABLE.

36355

THE WEST SIDE TRUST & SAVINGS BANK,

Appellant,

v.

ABE LOPOTEN,

Appellee

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 629¹

Opinion filed Feb. 7, 1934

MR. JUSTICE KEEEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment for the defendant entered in the Municipal Court of Chicago upon a hearing without a jury. The action of forcible entry and detainer was brought by the plaintiff against the defendant to take possession of the premises described in the complaint, the plaintiff alleging that it is entitled to the possession of a certain apartment at 2545 Altgeld Street, Chicago, Illinois, and that Abe Lopoten unlawfully withholds possession.

Plaintiff is the trustee by reason of a certain trust deed which conveyed the premises involved in this proceedings. Payment of principal due on June 31, 1931, is in default according to the terms of the trust deed and by the provisions of the trust deed, plaintiff is given the right to take possession of the premises and to collect the rents, issues and profits therefrom. On May 31, 1932, it entered into possession of the premises and appointed one Ike Fishman, one of the grantors in said trust deed, as its agent in managing the building. Fishman, with the knowledge and consent of the other grantors in said trust deed went to the building on May 31, 1932, and served notice signed by the plaintiff upon the defendant, a tenant occupying part of said premises, to pay rent only to the plaintiff's agent. Like notices were served on the other tenants of the premises to pay rent to plaintiff's agent, and notices of the election by the trustee to collect the rents were sent to the makers of the trust deed, the owners of the equity of redemption. Fishman

THE FIRST EIGHT YEARS OF THE LIFE OF

JOHN F. KENNEDY

V.

THE LIFE OF

JOHN F. KENNEDY

Opinion filed Feb. 7, 1934

DR. JAMES W. HARRIS, M.D., F.R.C.S., F.R.C.P., F.R.C.S.D., F.R.C.S.(E), F.R.C.S.(G), F.R.C.S.(H), F.R.C.S.(I), F.R.C.S.(J), F.R.C.S.(K), F.R.C.S.(L), F.R.C.S.(M), F.R.C.S.(N), F.R.C.S.(O), F.R.C.S.(P), F.R.C.S.(Q), F.R.C.S.(R), F.R.C.S.(S), F.R.C.S.(T), F.R.C.S.(U), F.R.C.S.(V), F.R.C.S.(W), F.R.C.S.(X), F.R.C.S.(Y), F.R.C.S.(Z)

THIS IS AN OPINION OF THE HONORABLE JUDGE OF THE SUPREME COURT OF THE UNITED STATES

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as plaintiff's agent managed the building for several months, collected the rents, and accounted to plaintiff on June 8, 1932, August 15 and 25, 1932.

From the accounting it appears that the defendant paid rent to the plaintiff's agent; that Fishman's authority as agent was revoked and that one Joseph M. Leibow was appointed and acted as plaintiff's agent; that statutory notice was served upon the defendant by Leibow, demanding payment of the accrued rent, and upon failure to pay, the plaintiff demanded possession of the premises occupied by the defendant.

The defendant upon the trial of the case offered no evidence, and upon the state of the record the court found the defendant not guilty of unlawfully withholding from the plaintiff possession of the premises described in plaintiff's complaint.

Upon this appeal no appearance was entered by the defendant, and this court is without the benefit of the theory upon which he bases his defense.

The plaintiff as trustee contends that having entered upon the premises for condition broken, as authorized under the terms of the trust deed signed by the grantors, and received payment of rent from the defendant, a tenant of the mortgagors, the relation of landlord and tenant exists, and the plaintiff as trustee can maintain forcible entry and detainer upon failure or refusal of the defendant to pay rent for the use of the premises occupied by him; that payment of rent for the premises by the defendant to the plaintiff is an attornment.

It must be admitted as a fact appearing from the record that defendant was in possession of the described premises prior to the date of plaintiff's collection of rents; that possession was delivered to the defendant by the mortgagors as landlord; and that defendant has since occupied the premises as lessee.

... ..

1. The Commission is composed of the following members:

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It has been held to be the rule by the Supreme Court in the case of Lowe v. Emerson, 45 Ill. 180, that a tenant in possession cannot attorn to a stranger, or set up purchase of a title against his landlord, although it may be a paramount title, without first delivering possession of the premises to his landlord. See also Hardin v. Forsythe, et al., 33 Ill. 312. The fact that the defendant did pay rent to the plaintiff does not, after a default in payment of rents due, give the plaintiff right to possession of the premises, nor aid the plaintiff in the right to maintain this form of action.

The plaintiff bases its right of action upon the trust deed signed by the mortgagors conveying to the plaintiff the real estate described, to secure the payment of the amount of the loan upon the conditions set forth in the trust deed. The title so delivered is a base or determinable fee, and in passing upon an analogous question as to the right of the trustee appointed in a trust deed to maintain a forcible entry and detainer action, this court said in the case of Cody Trust Company v. Dittmar, et al. Gen. No. 36462.

"It is the contention of the plaintiff that after default the fee is in itself, as mortgagee, and its right to forcible entry and detainer immediately attaches, as it is entitled immediately to the right of possession. The Supreme Court has recognized the right to possession on condition broken in Sohrer v. Deatherage, 336 Ill. 450. In that opinion it said: 'Upon default in the condition of the mortgage the mortgagee has the right to possession against the mortgagor, his grantee, lessee or anyone claiming under him by any right. In such case the mortgagee has several remedies which he may pursue to enforce the payment of his debt, he may sue the mortgagor in assumpsit for a judgment upon the personal obligation; he may sue in equity for the foreclosure of the mortgage; or he may recover the possession of the mortgaged property by an action of ejectment. These remedies are concurrent or successive, as the mortgagee may deem proper, and he may pursue any two or all three of the remedies simultaneously. (Bradley v. Lightcap, 202 Ill. 154; Fish v. Glover, 154 id. 86; Harner v. Aly, 73 id. 581; Meyers v. Meyers, 68 id. 92; Carroll v. Ballance, 26 id. 9; Venant v. Allmon, 23 id. 30.)'

It is significant, however, that an action in forcible entry and detainer is brought for the purpose of repossessing real estate which was originally in the possession of the

It was held in the case of the Trust

in the case of Trust v. Trust, 111. 111. 111. 111. 111. 111.

the court held that the right of the plaintiff to recover

was not affected by the fact that the defendant had

received the money from the plaintiff in the form of a

loan, and that the plaintiff had not repaid the loan.

The court held that the plaintiff was entitled to recover

the money from the defendant, and that the defendant was

liable to pay the money to the plaintiff.

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the money from the defendant, and that the defendant was

liable to pay the money to the plaintiff.

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plaintiff. 'An action of forcible entry and detainer is strictly possessory in its nature, and, unless otherwise expressly provided by statute, a person who has never been in possession of land cannot maintain the action to obtain possession; and if he has any title or interest in the land he must, as has been stated, seek to establish it in some other form of action. Generally speaking, in order to maintain the action, it must appear that plaintiff was in peaceful and exclusive possession of the premises in controversy at the time of the acts complained of, and that he had been forcibly ousted or that possession was peacefully obtained and forcibly withheld by defendant. To sustain plaintiff's right to restitution all that need be shown is that plaintiff was in the actual possession of the property and was forcibly dispossessed by defendant.' 28 Corpus Juris, forcible Entry and Detainer, Sec. 48, p. 816.

The Forcible Entry and Detainer Act, Chap. 57, Cahill's Ill. Rev. Stat. 1933, Par. 2, provides:

'The person entitled to the possession of lands or tenements may be restored thereto in the manner hereafter provided;'

From this provision it appears that the Forcible Entry and Detainer Act was intended to provide a means of securing possession for some party who had previously been in possession. The clauses 1 to 5 inclusive of paragraph 2, relate to the right to repossession by a party who had previously been in possession. The 6th clause, however, appears for the first time to provide for possession by forcible entry and detainer for those who were not originally possessed of the land. This clause reads as follows:

'Sixth - When lands or tenements have been conveyed by any grantor in possession, or sold under the judgment or decree of any court in this State, or by virtue of any sale in any mortgage or deed of trust contained, and the grantor in possession, or party to such judgment or decree or to such mortgage or deed of trust, after the expiration of the time of redemption, when redemption is allowed by law, refuses or neglects to surrender possession thereof after demand in writing by the person entitled thereto, or his agent.'

In the case of Knox v. Hunter, 150 Ill. App. 392, it appears that an action was brought in forcible entry and detainer to obtain possession of real estate under what appeared to be a trust deed or mortgage on the premises. After quoting clause 6 of paragraph 2 of the Forcible Entry and Detainer Act, as herein set forth, the court in its opinion in that case, said:

'Sloan had never been in possession, neither had Harper. These lands had not been sold under any judgment or decree. He held in Hurner v. Pierce, 196 Ill. App. 206, that forcible detainer could not be maintained where the party suing had never been in possession, the language of the first part of section 2 being that the person entitled to possession "may be restored thereto."'

The property involved in this proceeding was not sold under the judgment or decree of any court in this state nor by virtue of any foreclosure sale in any mortgage or deed of

trust contained. Consequently, the right, if any right there is in the plaintiff, would be in the provision that forcible entry and detainer may lie when lands or tenements have been conveyed by any grantor in possession. We do not believe that a trust deed comes within the meaning of this provision, but rather that it applies to a straight grant or conveyance by deed or conveyance. Peters v. Balke, 170 Ill. 304. Particularly are we impressed with this interpretation because of the fact that in the same clause 6 of paragraph 2 of the act it is provided that, upon a foreclosure of a mortgage or trust deed and after sale and after the expiration of the time of redemption, the action will lie upon demand by the person entitled to possession under the foreclosure proceedings. It is also a well established principle that there are no equitable defenses permissible in an action for forcible entry and detainer, but such defenses are cognizable only in a court of equity. Peters v. Balke, supra; Gardner v. Gohn, 95 Ill. App. 28; Keeley v. Luke, 108 Ill. 395."

Applying the reasoning in the case of Sody Trust Co. v.

Dittmar, supra, the plaintiff does not come within the provisions of the Forcible Entry and Detainer Act, and therefore cannot maintain this action. For this reason and the other reasons indicated in this opinion, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

36570

HERMAN GUTH and HATTIE GUTH,

Appellees,

v,

GREENBAUM BONS BANK & TRUST
COMPANY and JOHN D. GLANCY,

Appellants.

APPEAL FROM

SUPERIOR COURT OF

COOK COUNTY.

273 I.A. 629²

Opinion filed Feb. 7, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

This was an action of trespass on the case filed in the Superior Court of Cook County between the plaintiffs and the defendants named. A trial was had before a jury, and at the close of the hearing the jury retired, considered, and returned a verdict for the plaintiffs in the sum of \$1307.50, upon which the court entered a judgment and from which judgment the defendant John D. Glancy appeals to this court.

To the amended declaration the defendant filed a demurrer, which was withdrawn, and thereupon the defendant filed a plea of non-joint liability and a plea of the general issue. Upon the issues being joined the case was tried, and from the evidence offered by the litigants it appears substantially that the plaintiffs entered into two written contracts for the purchase of two lots located in Mundelein, Illinois; that prior to the purchase of the real estate, it was represented to the plaintiffs by A. E. Hanson, acting as agent of the sellers, that the lots were located at the corner of Lake and Maple Avenues in Mundelein, Illinois; that the plaintiffs purchased the corner lot for \$2500 and paid on account of the purchase price \$500 in gold bonds and \$125 in cash; that thereafter the plaintiffs purchased the adjoining lot, upon the assurance of the agent Hanson that it was located as represented, and paid therefor \$2250, a part of which was paid in a gold bond for \$500, and \$50 in cash; that

at the time payments were made to apply on the purchase price of the lots, a memorandum agreement was received by the plaintiffs in which the lots were described as Lots 4 and 5 in Killey's Subdivision of Mundelein; that thereafter formal contracts, dated January 1, 1927, and February 1, 1927, were delivered to the plaintiff; that these contracts were signed by the defendant John D. Clancy, individually, in one, and as a beneficial owner in the other, and said Greenebaum Sons Bank & Trust Co., as trustee.

Payments were made by the plaintiffs until April 1, 1927, when for the first time, Herman Guth, one of the plaintiffs, visited Mundelein and learned that the lots described in the contracts executed by the defendants were not located at the corner of Lake and Maple Avenues in Mundelein, but were situated in a different part of the subdivision; that the sidewalks were not installed and streets were not improved as represented by the seller's agent, and there is evidence that Hanson called upon the plaintiffs at their home, exhibited a plat, and pointed out the location of the lots; that the plaintiffs believed that the lots were located at the corner of Lake and Maple Avenues in Mundelein, Illinois, and that the representations made by Hanson were true; that at that time the plaintiffs stated to Hanson they wanted to see the land; that thereupon Hanson, the agent, stated he would show them the condition of the land, and exhibited to them a picture of the property, showing that improvements had been made; that curbing and roads had been installed, and acting upon these representations, the contracts were entered into for the purchase of the lots.

There is evidence in the record that the defendant Clancy, together with Killey, as the owners, acknowledged the making of the subdivision known as Killey's Subdivision of Mundelein, in which the real estate described in the contracts is located; that the defendant John D. Clancy advanced \$4,000 to Killey, part of the purchase price for the tract of land subsequently subdivided and known as Killey's

[illegible]

Subdivision of Mundelein, Illinois; that this land was conveyed to the Greenebaum Sons Bank & Trust Company to secure the defendant John D. Clancy for the money advanced to Killey to purchase the land.

The defendant contends that there is a complete failure by the plaintiffs to offer evidence to sustain the allegations of plaintiffs' amended declaration. In this connection it has been called to our attention by the plaintiff that no motion for a new trial, or a ruling of the trial court thereon, is embodied in the bill of exceptions, and therefore the sufficiency of the evidence to support the declaration is not saved for review. Upon an examination of the abstract this seems to be a fact. It therefore follows that the question of the sufficiency of the evidence, as a matter of law, to justify submission of the cause to the jury is not saved for review, and this applies even, as in this case, where a motion for a new trial certified to by the Clerk of the Court, does appear in the transcript of the proceedings. In the case of O. B. & M. B. Co. v. Hasselwood, 194 Ill. 69, the court, in passing upon a like question, said:

"The question of the sufficiency of the evidence to support the verdict of a jury and the judgment rendered thereon is not open to review, even in courts having jurisdiction to determine that question, unless a motion for a new trial was made and the motion overruled and exceptions thereto preserved by a bill of exceptions. (Reichwald v. Baylord, 73 Ill. 503; Law v. Fletcher, 84 id. 48; Illinois Central Railroad Co. v. O'Keefe, 154 id. 508.) As will hereafter be made to appear, the record does not disclose that a motion for a new trial was presented to the trial court. * * *

It appears from the bill of exceptions objections were made and exceptions taken to the rulings of the court on questions of the admissibility of testimony, but it is essential to the right of appellant to have such rulings reviewed. The trial court should have been asked to grant a new trial because of such rulings. (Pottle v. McArthur, 13 Ill. 454; Daniels v. Shields, 38 id. 197; St. Louis, Alton and Terre Haute Railroad Co. v. Dorsey, 68 id. 326; Nease v. Letz, 73 id. 371.) Errors of the court in rulings as to the admissibility of evidence constitute grounds for a new trial. It is the duty of litigants to seek this mode of relief in the trial court, and resort to an appeal only in the event the trial judge erroneously refuses to grant a new trial, and such refusal is excepted to and the exception preserved. Illinois Central Railroad Co. v. Johnson, 191 Ill. 594. A motion for a new trial appears in the transcript of the proceedings and files as certified

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to by the clerk. This action on the part of the clerk is extra-official. The authority to certify that a motion for a new trial was entered rests alone in the trial judge. Such motions only become a part of the record by being incorporated in the bill of exceptions."

See also Greenwell v. Hagg, 298 Ill. 459.

Many of the questions raised by the defendant in this case go to the sufficiency of the evidence to sustain the plaintiffs' action, and from the authorities referred to, these questions were not properly saved for review, although from the facts as they appear in this opinion, the evidence in the record amply sustains the verdict of the jury.

The defendant complains of the remarks and the attitude of the trial court in the presence of the jury during the trial as being highly prejudicial. We have examined the record and are not able to find that the trial court's actions were such as to prejudice the jury against the defendant's cause, or that such remarks were made as would subject the trial court to criticism. We have examined the record and considered these matters notwithstanding the defendant made no objection to the alleged prejudicial remarks and attitude of the court in the presence of the jury.

Further complaint is made by the defendant that the court did not admit competent evidence offered by the defendant. This evidence, if offered, is not pointed out by the defendant, and for this failure we will consider the objection waived.

There is one further question to be considered, and that is; Did the court err in entering an order dismissing the cause as to the co-defendant Greencbaum Sons Bank & Trust Company? This action by the plaintiffs was for fraud and deceit to recover damages sustained, and not an action to recover damages because of a default or breach in the performance of a contract. In a tort action, as in this case, the plaintiff may join several defendants and recover against one or more of the defendants.

For the reasons indicated in this opinion, we find no error in the record such as would justify a reversal of the judgment. Accordingly the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

THE UNIVERSITY OF CHICAGO

no other in the world is so well known - and that of the world.

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26580

GORDON LEINSKE, a minor, by Sophia E.
Leinske, his mother and next friend,

Appellee,

v.

ROBERT SALISBURY,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

273 I.A. 629⁷

Opinion filed Feb. 7, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff, Gordon Leinske, a minor, by Sophia E. Leinske, his mother and next friend, sued Robert Salisbury for personal injuries in an action of trespass on the case. The case was tried before a jury, who found the defendant guilty and assessed the plaintiff's damages at \$1500. Judgment was entered upon the verdict, from which the defendant appeals to this court.

The accident occurred about 7:30 in the evening on October 28, 1930, at the intersection of Main and Liberty Streets in Wheaton, Illinois. Main Street, which runs north and south, is 46 feet in width, and Liberty Street, which runs east and west, is about 42 feet in width. Both streets are paved with concrete. Although the night was dark when the accident occurred, the street lights were burning and there was illumination from a gas station located at or near the intersection.

The plaintiff and Earl Harrison, a witness for the plaintiff, both testified that there was a red mushroom light at the center of the intersection on the night of the accident. There is a conflict in the evidence as to whether the mushroom light was in fact at the intersection. The defendant, who had been Commissioner of the Department of Public Health and Safety of Wheaton from 1927 to 1931, and witnesses Curran and Pederson, testified that there was no mushroom light at the intersection.

The plaintiff, who at the time of the accident was

thirteen years of age, and another boy, Earl Harrison, used the latter's bicycle. The plaintiff rode on the saddle and Earl sat sideways on the bar running from the handle bars to the saddle, and the boys proceeded from the Harrison home to the intersection - some fourteen blocks. The bicycle carried no light. The boys proceeded riding in the manner described, going south on Main Street, across the railroad tracks of the Northwestern Railroad and the Electric Interurban tracks, and down the incline to Liberty Street. The bicycle was proceeding south and approaching Liberty Street when Earl Harrison saw the defendant's automobile coming from the north on Main Street. The defendant drove his automobile into Main Street, one block south of Liberty Street, and proceeded in a northerly direction on Main Street. There is evidence that the automobile was moving at about 18 or 20 miles an hour; that the defendant slowed down the automobile when he reached Liberty Street and made a left-hand turn into Liberty Street.

The conflict in the evidence is upon the question as to the point at which the defendant made the left-hand turn. Did he turn far to the right at the center of the intersection, or cut the corner? The defendant's view, according to his evidence, was obstructed by a great many reflections in the windshield and windows of his car, and he did not see the bicycle until within the range of his headlights, at which time the bicycle was from 6 to 8 feet in front of the defendant's automobile and he immediately put on the brakes.

There is evidence that the defendant turned to the right of the center in making the left-hand turn at the intersection of the streets, and that the boys on the bicycle had crossed Liberty Street from the north to the south on the west side of Main Street and had reached a point variously estimated from 2 to 6 feet from the drinking fountain located at the southwest corner, when the plaintiff was struck by the defendant's car, and injured. The plaintiff as a

result of the accident suffered a fractured clavicle, which was reduced, and a punctured wound in the ankle, which was healed during the plaintiff's three weeks' stay in the hospital.

The defendant contends that the evidence discloses that the plaintiff was guilty of negligent conduct, which contributed to the happening of the accident and which bars his recovery notwithstanding the fact that the plaintiff was 13 years of age at the time of the accident. The plaintiff was required by rule of law to exercise that degree of care and caution for his own safety which would be exercised by a child of like age, intelligence and experience under similar circumstances. The defendant, however, stresses the point that the plaintiff was propelling the bicycle without a light on the occasion in question, and that it was held in Cook v. Fogarty, 103 Ia. 500, that riding a bicycle by a person on a public highway at night without a light constitutes negligence. This court cannot agree with this view. Whether the plaintiff was negligent in riding the bicycle must be determined by the facts and circumstances in evidence. The court had this in mind when it said in the case of Cook v. Fogarty, supra, that

" * * and a person who rides a bicycle without a light or signal of warning, in a public thoroughfare, where he is liable to meet moving vehicles or pedestrians, at a time when objects can be discerned readily at a distance of but a few feet, is guilty of negligence."

The degree of care to be used by the plaintiff under the rule above stated is for the jury. The jury no doubt had in mind the testimony of the defendant that -

"The light was good there. These lights had been in a long time. I knew about that. There was an ordinary white incandescent light at the northwest corner. I wouldn't say exactly where the lights are, but there are lights and they are shown in the picture. These were burning at the time of the accident. They were possibly 12 or 13 feet high. They are about 12 or 13 foot iron posts with a round white globe

result of the accident noticed a fractured skull, which was
fractured, and a fractured skull in the neck, which was a serious injury.
The accident's three years' stay in the hospital.

The defendant contends that the witness's testimony that
the plaintiff was guilty of negligent conduct, which resulted in
the destruction of the accident and which was his primary cause-
effecting the fact that the plaintiff was in a position to see the
of the accident. The plaintiff was negligent in not seeing
existence that before it came and which for his own safety should
be explained by a child of like age, intelligence and knowledge
under similar circumstances. The defendant, however, contends the
point that the plaintiff was negligent in not seeing a light
on the occasion in question, and that it was said in People v. ...
1st 11, 1907, that while a plaintiff is a person in a similar position
as a right without a light constitutes negligence. This court should
agree with this view, because the plaintiff was negligent in failing
the lights were he instructed by the Court and the instructions in
evidence. The court said this in this case it said in the case of ...
... v. ..., 1907.

"... and a person who takes a bicycle riding is liable
or amount of warning, in a similar investigation, which is
is liable to meet moving vehicles or pedestrians, at a
line when objects can be observed readily in a distance
of not a few feet, is guilty of negligence."

The degree of care to be used by the plaintiff under the
case seems stated in the law. The law is stated in the
the testimony at the defendant said -

"The light was good then. The light was good in a line
line. I know about that. There was no difficulty with the
defendant light on the defendant's car. I wouldn't say
exactly where the light was, but I know the light was there
and there in the distance. I don't know where at the time of
the accident. They were standing in it in that place. They
the light in it in that place with a light which glared

on top. At the opposite corner, where the filling station was, there was a lot of light. The street was well lighted at the time. I had no difficulty in seeing objects or persons on the street."

We have considered the other cases cited by the defendant on this point and the conclusions reached by the courts, and find that the decision of the court in each particular case where a negligent act contributed to the accident is based upon the facts, and that these cases are not of material aid upon the questions as they appear in the record in the instant case. The rule announced by the Supreme Court in the case of Maskaliunas v. C. & N. I. R. R. Co., 318 Ill. 143, is binding in these words:

"The law is clearly established by great weight of authority, that between the ages of seven and fourteen the question of culpability of the child is an open question of fact and must be left to the jury to determine, taking into consideration the age, capacity, intelligence and experience of the child." (Chicago and Alton Railroad Co. v. Becker, supra; Lake Erie and Western Railroad Co. v. Klinkrath, 227 Ill. 432; City of Peeking v. McMahon, 154 id. 141; Cockford, Rock Island and St. Louis Railroad Co. v. Delaney, 83 id. 198; McEldon v. Drew, supra; Lake Erie and Western Railroad Co. v. Mackey, 53 Ohio St. 370, 41 N. E. 980; City of Shawnee v. Cheek, 40 Okla. 227, 137 Pac. 724; Hepfel v. St. Paul, Minneapolis and Manitoba Railway Co. 42 Minn. 263, 51 N. W. 1049.)

Under the rule above stated, the court properly submitted to the jury the question of whether the plaintiff, who at the time of the accident was 13 years of age, was guilty of contributory negligence. We are of the opinion that the finding of the jury in this case is sustained by the evidence, and is not contrary to the manifest weight of the proof.

The defendant contends that the court erred in refusing to give to the jury defendant's refused instruction No. 5, which is as follows:

"You are instructed that if you believe from the evidence that the plaintiff, Gordon Leinecke, was guilty of contributory negligence as defined in these instructions, then your verdict should be not guilty and this is true even though the defendant was negligent."

The jury was instructed by the court in defendant's instructions that

the plaintiff must prove by a preponderance of the evidence not only that the defendant was guilty of negligence, but also that the plaintiff was in the exercise of ordinary care as defined in the instructions at the time of and immediately before the accident occurred, and that no presumption arises that the defendant was negligent from the fact that the accident happened; and further, that if the jury believe from the evidence that the defendant was not guilty of negligence as charged by the plaintiff, or if the jury believe from the evidence that the plaintiff was guilty of contributory negligence as defined in the instructions, then they have no right to compromise the question of the defendant's liability and grant the plaintiff some amount merely because he was injured. And it further appears from the instructions that the plaintiff was required to exercise due care and caution for his own safety as defined, and his failure to exercise such care and caution would be negligence.

While it is true that the issue in the case before us was whether the defendant was guilty of negligence and the plaintiff was guilty of contributory negligence for a boy of his age, capacity and experience, then he, the plaintiff, could not recover. This court has examined the instructions and is of the opinion that the instructions as given fairly presented to the jury not alone the law as applied to the plaintiff, but also as applied to the defendant, and we do not believe there was such error in the giving of the instructions or the refusal to give instructions as would justify a reversal.

The defendant also contends that the trial court should have received defendant's Exhibit No. 4 for identification in evidence, which Exhibit is a certified copy of an ordinance of the City of Wheaton, in Du Page County, Illinois, and provides, in substance, that it is unlawful for any person to ride any bicycle on any street or public place in the night time unless the bicycle is equipped with a lighted bicycle light or other suitable light. It appears that at the

close of the case counsel for the defendant advised the court that the defendant would rely upon the ordinance; that a certified copy had not as yet arrived in the court room; that efforts had been made by the defendant to have it on hand at the opening of the court session. The court, however, ordered counsel to proceed. Arguments were made by the attorneys for both parties, at the close of which a certified copy of the ordinance was at hand and offered in evidence by the defendant. The case was adjourned to the following day and the ordinance was again offered by the defendant and denied by the court on the ground that the offer was made too late.

The defendant urges that in the interest of justice the trial court should have received the ordinance in evidence at the time it was offered by the defendant. However, the plaintiff should have had an opportunity in his argument to the jury to discuss the applicability of the ordinance under the facts, which applicability would have been denied if the court, after arguments were closed, had admitted the ordinance in evidence. It was solely a matter of discretion on the part of the court after the evidence had been closed and arguments made to the jury, to permit the case to be opened up to allow this evidence to be introduced, and under the facts as they appear we do not believe the discretion of the court was abused by refusing the offer.

There being no reversible error, the judgment is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

36589

MERCANTILE DISCOUNT CORPORATION,
a Corporation,

Appellant,

v.

JOHN J. CONWAY,

Appellee.

28
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 629⁴

Opinion filed Feb. 7, 1934

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff corporation was engaged in the business of discounting commercial paper and buying from automobile and machinery dealers promissory notes obtained from purchasers of automobiles and machines on the installment plan. On or about March 26, 1932, the plaintiff purchased from the Archer Motor Company a promissory note in the principal sum of \$857.34, alleged to have been signed by John J. Conway, the defendant, and delivered by him to evidence time payments in the purchase of a Cord cabriolet automobile.

At the time of the purported sale of the automobile by the Archer Motor Company to the defendant, a conditional sales agreement was entered into by the Motor Company and the defendant. The plaintiff, on the 14th day of July, 1932, obtained a judgment by confession against the defendant under the power to confess judgment provided for in the note. The amount of the judgment entered in the Municipal Court was \$399.05.

Thereafter, the defendant on the 14th day of August, 1932, filed a petition under oath moving the court to set aside the judgment. This petition states, in substance, that the sale of the automobile made by the holder of the note and amount received as applied to the principal of the promissory note executed by the defendant, was fraudulent; that there was a failure of consideration; that the plaintiff was not an innocent holder for value; that the defendant was not allowed a credit by the plaintiff for the sum of \$183.34, unearned premium on the cancelled insurance policy for fire and theft,

642

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Opinion filed Feb. 7, 1934

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible][illegible]

Thereafter, the defendant on the same day of January, 1930, filed a petition under seal having the court in my hands the same. This petition stated, in substance, that the wife of the defendant made up her mind at the time and amount received as explained in the foregoing of the promissory note executed by the defendant, was fraudulent; that there was a failure of consideration; that the plaintiff was not an innocent holder for value; that the defendant was not allowed a credit by the plaintiff for the sum of \$100.00, and that the plaintiff was the promised knowledge holder for the same.

upon the principal of the note; that the automobile purchased by the defendant was returned to the Motor Company in full satisfaction of this claim and before the note was negotiated and delivered to the plaintiff, and that the plaintiff thereafter accepted the note with full knowledge of the fact.

The court entered an order that the defendant be given leave to defend, and that the defendant's petition stand as an affidavit of merits, and after trial by jury a verdict was returned finding the issues for the defendant and judgment was entered on the verdict by the court. From this judgment the plaintiff appeals to this court. In the consideration of this appeal the court is not aided by the brief of the defendant, who failed to file an appearance.

Upon an examination of the record there appears what is purported to be an appeal bond signed -

"Mercantile Disc. Corp. (SEAL)
Samuel Simon (SEAL)
Atty.
UNITED STATES FIDELITY & GUARANTY (SEAL)
COMPANY
By Edmond J. Moreney (SEAL)"
Attorney-in-fact

in an appeal from a judgment recovered by John J. Conway on the 12th day of November, A. D. 1932, in the Circuit Court of Cook County, approved and ordered filed by George V. McIntyre, Judge,

The condition provided for in the bond is as follows:

"The condition of the above obligation is such, That whereas, the said John Conway did, on the 12th day of November, A. D., 1932, in the Circuit Court of Cook County, in the state aforesaid, and of the _____ Term thereof, A. D. 1932, recover a judgment against the above bounden Mercantile Discount Corporation for the sum of _____ Dollars and _____ Cents, besides costs of suit; from which said judgment of the said Circuit Court of Cook County, the said _____ has prayed for and obtained an appeal to the Appellate Court, within and for the First District in said State."

The appeal allowed the plaintiff by the order was from a judgment entered in the Municipal Court of the City of Chicago on the 12th day of November, A. D. 1932, for the defendant John J. Conway

upon the finding of the fact; that the defendant, by the
defendant was returned to the court house in full possession
of this claim and before the note was accepted and delivered to
the plaintiff, and that the plaintiff, by the defendant, accepted the note
and full knowledge of the fact.

[illegible]

— *Thymus* leaf (young) oil of 100 gms

(24-1) _____
(24-2) _____
(24-3) _____
(24-4) _____
(24-5) _____

The condition provided for the book is as follows:
 removed and entered filed by George V. Seligson, Tampa,
 by at November 1, 1930, in the State House of Florida,
 is no record from a subject recovered at June 1, 1930, on the 1930

[illegible]

On 11th day of November, 1951, J. C. LEE, for the defendant, and J. C. LEE, for the plaintiff, appeared in the District Court of the United States for the District of Columbia, and filed a motion to set aside the verdict and judgment in the within captioned case, and to grant a new trial.

for costs of suit, upon condition that the plaintiff file a bond within thirty days from the entry of this judgment. Thereafter, in order to perfect an appeal, the plaintiff was obliged to conform to the order of appeal. The plaintiff having failed to file a bond within thirty days from the judgment entered in the Municipal Court of Chicago, as provided for in the order, this appeal is not properly in this court. Tedrick v. Ellis, 153 Ill. 214; Lindsay v. Garst, 252 Ill. App. 457.

The purported bond filed provided for an appeal from a judgment entered in the Circuit Court of Cook County and the record filed in this case is in a proceeding had in the Municipal Court of the City of Chicago. A bond was not properly executed and filed by the plaintiff, and therefore the appeal will be dismissed.

APPEAL DISMISSED.

HALL, P.J. AND WILSON, J. CONCUR.

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and the children.

and the children.

38801

BENJAMIN G. KILPATRICK, Successor
Trustee,

Appellant,

v.

CHICAGO LAWN SAFE AND SECURITIES
COMPANY, et al.,

Defendants.

IRWIN T. GILRUTH, Receiver of Chicago
Lawn State Bank, a Corporation,

Appellee.

179
APPEAL FROM

7
SUPERIOR COURT

COOK COUNTY.

273 I.A. 630

Opinion filed Feb. 7, 1934

MR. JUSTICE HENDEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainant from an order entered on December 14, 1932, upon an intervening petition filed on December 9, 1932, by Irwin T. Gilruth, as receiver of the Chicago Lawn State Bank, in the then pending foreclosure proceedings in the Superior Court of Cook County, Illinois, and upon the answer of the complainant to the petition.

It appears from the order of December 14, that the court heard the matter upon the verified petition of the receiver for leave to remove from the premises located at 3150 West 63rd Street, Chicago, Illinois, a certain rectangular twelve inch vault door, and, having heard the evidence of the witnesses, found that the petitioner is the duly qualified and acting receiver; and

"That the twelve inch rectangular vault door sought by the petitioner herein is personal property and is not permanently attached to the real estate under foreclosure herein; that said door is one of the assets of the estate of the Chicago Lawn Trust & Savings Bank, a corporation, and that the petitioner, as the receiver of such estate, is entitled to possession of the said door and is entitled to enter the said premises and to remove the said door therefrom, and that said vault door is not subject to the lien of the trust deed herein."

It is evident from this order that the conclusion of the court that the vault door in question is personal property and

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Opinion filed Feb. 7, 1934

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is not permanently attached to the building, is a finding of an ultimate fact, and is based upon the evidence heard by the court. There is a suggestion by the complainant in the foreclosure proceedings that the order was entered only upon the verified petition of the receiver. The verity of the record cannot be challenged by suggestion. The trial court heard the evidence and this court will assume that the order is so supported. The failure of the complaining party to preserve the question in a mode provided for by law would not justify this court in indulging in speculation.

It is contended that the order is in favor of the Chicago Lawn Trust & Savings Bank; that such bank is not a party in the case and is not named as a party anywhere in the proceedings. It is pointed out that the Chicago Lawn State Bank was made a party to the bill of complaint and that Irwin T. Gilruth, as its receiver filed an answer to the bill.

The order before this court describes the petitioner as the receiver of the Chicago Lawn Trust & Savings Bank. The fact is that the receiver was appointed for the Chicago Lawn State Bank, and the order of appointment was entered in case number 540156, now pending in the Superior Court of Cook County. The complainant named in the foreclosure proceedings perfected an appeal from the order now under consideration allowing the receiver of the Chicago Lawn State Bank to remove the valut door in question, and the appeal bond filed by the complainant recites that the complainant and the surety therein named are firmly bound to the receiver for the Chicago Lawn State Bank.

The receiver, as we view the record, was appointed and is acting as receiver for the Chicago Lawn State Bank in case number 540156, and as such receiver was made a party to the pending foreclosure proceedings. From the record it clearly appears that the receiver is acting for the Chicago Lawn State Bank, and was regarded as such receiver by the complainant when he filed his appeal bond in the instant case.

is not permanently returned to the original is a finding of no
mistake fact, and is found upon the evidence found by the court.
There is a suggestion for the commission in the Commission's report
that the two sides are not only with the verified version of
the record. The variety of the record cannot be considered as
suggestion. The trial court heard the evidence and then found all
evidence that the court is an element. The finding of the commission
that the court is preserved the evidence in a more detailed way than
could not justify this court is included in the evidence.
It is contended that the court is in favor of the evidence
that there is a finding of fact; that such work is not a matter in the court
and is not found in a party's argument in the proceedings. It is
pointed out that the evidence found that there was a party to the
bill of complaint and that there is a party to the evidence found
an answer to the bill.
The court's finding of fact is not a finding of fact as
the receiver of the Chicago loan bank is a finding of fact. The fact is
that the receiver was appointed for the Chicago loan bank, and
the order of appointment was entered in case number 2412, and
working in the receiver's office of Cook County. The commission's report
in the Commission's proceedings reflected as correct from the paper and
after consideration finding the receiver of the Chicago loan bank
want to remove the bill that is pending, and the receiver found that
by the commission's finding that the commission and the court's finding
named the bill as the receiver for the Chicago loan bank.
The receiver, as he also the court, was considered and
is called as receiver for the Chicago loan bank in case number
2412, and as such receiver was not a party to the bill of com-
plaint. The bill of complaint is already against the
receiver is finding that the Chicago loan bank was not a party
to the bill of complaint by the commission's finding that the receiver
in the instant case.

The complainant in the foreclosure proceedings complains that the court erred in permitting the filing of the intervening petition by the receiver of the Chicago Lawn State Bank; that the bank was made a party to the bill to foreclose, and answered by its receiver, and in its answer failed to ask for affirmative relief as to the ownership of the vault door; that the vault door is a part of the security covered by the trust deed, and the ownership should be determined upon the final hearing in the foreclosure proceedings.

It does not appear that the filing of the petition by the receiver was objected to in the answer of the complainant, and the question cannot be raised in this court for the first time. Complainant is not permitted to speculate as to the possibility of a favorable outcome of the proceedings, and being disappointed in this regard, question the procedure for the first time upon appeal.

The motion to strike the reply brief filed by Benjamin G. Kilpatrick, Successor in Trust, Complainant, is not considered for the reason that we have considered the merits of the appeal.

Having considered this appeal and the questions called to our attention, we are unable to find that the Chancellor acted without authority, and we are satisfied that there is no error in the record which would justify a reversal of the order. The order is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

The complaint in the above-entitled case is
that the court acted in granting the writ of habeas corpus
petition by the receiver of the said bank, and that the
bank was made a party to the bill in controversy, and answered by the
receiver, and in its answer failed to set forth affirmative relief as
to the ownership of the bank's assets; and that the court acted in a
manner of the receiver by the first writ, and the receiver's
he determined upon the final hearing in the above-entitled case.
It does not appear that the bill in the receiver's
the receiver was objected to in the answer of the complaint, and
the question should be raised in this court by the first writ. Com-
plaint is not permitted to operate as a writ of habeas corpus in this
jurisdiction of the proceedings, and being distinguished in this
regard, the receiver for the first time was denied.
The action to strike the writ is filed by complaint
of Receiver, Receiver in Trust, Receiver, in the receiver's
for the reason that we have considered the matter of the writ.
We find ourselves in error and the receiver's
to my attention, we are unable to find that the Receiver's
alright, and we are satisfied that there is no error in
the record which would justify a reversal of the order. The entry
is affirmed.

CALVIN WATKINS.

WILL, F. L. AND OTHERS, v. WATKINS.

36608

MILTON S. YONBORG, as Trustee,
ADOLPH HAMMEL, Intervener,

Defendants in Error,

v.

MICHAEL J. BARTLEY and CECELIA BARTLEY,

Plaintiffs in Error.

WRIT OF ERROR TO

CIRCUIT COURT

COOK COUNTY.

273 I.A. 630

Opinion filed Feb. 7, 1934

MR. JUSTICE REBEL DELIVERED THE OPINION OF THE COURT.

This cause is in this court upon a writ of error directed to the Circuit Court of Cook County by the plaintiffs in error, Michael J. Bartley and Cecelia Bartley, to review the record in a certain proceeding containing an order entered by the court directing William S. Cassin, the receiver appointed by the court, to pay to Adolph Hammel from the funds in his hands, the sum of \$750.

The original action was instituted by the complainant, Milton S. Yondorf, as trustee, against the defendants Michael J. Bartley and Cecelia Bartley, and is a foreclosure proceeding to enforce a lien of a certain trust deed executed by these defendants as owners, conveying the real estate therein described, located in the City of Chicago, Illinois, to secure the payment of the indebtedness, which is more fully set forth in the bill of complaint.

On October 29, 1931, an order was entered by the court directing William S. Cassin, the then appointed receiver, to pay to the defendants, Michael J. Bartley and Cecelia Bartley, from the funds in his hands, the sum of \$2,500 for the purchase of certain chattels in the premises owned by the defendants, \$1,000 to be paid upon the entry of the order and the balance

WILSON & YOUNG, as trustees,
JAMES HARRIS, Receiver.

Defendants in error,

v.

EDWARD J. HARTLEY and GEORGE HARTLEY,

Plaintiffs in error.

Opinion filed Feb. 7, 1934

MR. JUSTICE ROBERT HULL delivered the opinion of the court.

This cause is in this court upon a writ of error directed to the Circuit Court of Cook County by the plaintiffs in error, Edward J. Hartley and George Hartley, to revise the record in a certiorari proceeding containing an order entered by the court directing William F. Harris, the receiver appointed by the court, to pay to Edolph Womel from the funds in his hands, the sum of \$750.

The original action was instituted by the complainant, Wilson & Young, as trustees, against the defendants Edward J. Hartley and George Hartley, and as a foreclosing mortgage to enforce a lien of a certain tract of land located by these defendants as owners, comprising the real estate therein described, located in the City of Chicago, Illinois, to secure the payment of the indebtedness, which is more fully set forth in the bill of complaint.

On October 22, 1931, an order was entered by the court directing William F. Harris, the then appointed receiver, to pay to the defendants, Edward J. Hartley and George Hartley, from the funds in his hands, the sum of \$2,500 for the purchase of certain chattels in the premises owned by the defendants, \$1,000 to be paid upon the entry of the order and the balance

in two installments - \$750 in thirty days, and \$750 in sixty days. All of the sum above mentioned, except \$750 in the hands of the receiver, was paid.

On December 4, 1931, Adolph Hammel filed his intervening petition in this action, from which it appears that on November 16, 1931, he recovered a judgment in the Municipal Court of Chicago in the sum of \$849.70 against Michael J. Bartley and Cecelia Bartley, the defendants in the above entitled cause; that this judgment is wholly unpaid; that an execution was issued and returned unsatisfied, and the intervener asked leave to garnishee the funds in the hands of the receiver, to apply in payment of the judgment. This petition was subsequently amended by leave of court whereby the petitioner prayed that the court enter an order requiring the receiver to pay the sum of \$750 in his hands to the intervener, or his solicitor of record, and for such other and further relief as equity may require.

On December 5, 1931, the defendants, Michael J. Bartley and Cecelia Bartley, filed their petition in the above cause, stating substantially that by an order entered in this court on October 29, 1931, the receiver was directed to pay to them \$2,500 for the purchase of the chattels in the premises described in the bill of complaint and owned by these defendants; that \$1,750 has been paid and that a balance of \$750 is still unpaid and in the hands of the receiver; that the petitioners have assigned this sum to Herman S. Landfield, who had made certain advances of money for the chattels to sold by the receiver. The prayer of the petitioners is that the court confirm the assignment by the defendants to Herman S. Landfield, and direct the receiver to pay the balance of \$750 to Herman S. Landfield.

Thereafter, on March 30, 1932, the court referred the matter to John G. Lowe, a Master in Chancery, to hear evidence

in the last January - 1891 in Henry case, and 1890 in Henry
days. All of the same above mentioned, except 1890 in the case
of the receiver, was paid.

On December 4, 1891, which amount first did in receiving
petition in this action, from which it was to be paid on November
18, 1891, he received a judgment in the amount of \$100.00 of
Chicago in the sum of \$100.00 by Henry case, which was
received in full, the balance in the above mentioned case;
that this judgment is really unpaid; that an execution was issued
and returned unsatisfied, and the receiver was forced to
maintain the fund in the hands of the receiver, to which he
payment of the judgment. This petition was subsequently amended
by leave of court whereby the petition prayed that the receiver
enter an order compelling the receiver to pay the sum of \$100.00 in his
hands to the receiver, at the expiration of three, and for such
other and further relief as equity may require.

On December 11, 1891, the balance of, which was
and received in full, which petition in the above case,
attaching thereto, that an order entered in this court on
October 20, 1891, the receiver was directed to pay to John H. Case
for the purpose of the balance in the amount mentioned in the
bill of complaint and owned by him as defendant; that \$1,000
has been paid and that a balance of \$100.00 in full amount and in
the hands of the receiver; that the petitioners were entitled
this sum to receive from the receiver, who had been directed to receive
of money for the receiver as said by the receiver. The receiver
of the petitioners is that the court should pay the balance to the
petitioners to receive from the receiver, and direct the receiver to
pay the balance of \$100.00 to receive from the receiver.

Thereafter, on March 20, 1892, the court entered the
order to John H. Case, a receiver in Henry case, to pay witness

and file his report and recommendations. The master proceeded to hear the evidence offered by the parties, and on October 19, 1932, the master filed his report recommending that the intervener, Adolph Hammel, be permitted to serve garnishee summons on the receiver, and that the petition of Michael J. Bartley and Cecelia Bartley be dismissed for want of equity.

On November 5, 1932, the court entered an order directing the receiver to pay the \$750 in his hands to the intervener, to apply on account of the judgment recovered by him in the Municipal Court of Chicago against Michael J. Bartley and Cecelia Bartley, and the court further found that the defendants' assignment to Herman S. Landfield was without consideration, and directed that defendants' petition be dismissed for want of equity.

The defendants Bartley contend that the evidence in the case is insufficient to justify the entry of the order, and that the court erred in directing the receiver in the cause to turn over to Adolph Hammel, the intervener, the sum of \$750 then in the receiver's hands.

This court is met at the outset with the fact appearing from the record that Michael J. Bartley and Cecelia Bartley, the defendants, failed to object to the master's report, and no exceptions were taken when the report was filed by the master, and the defendants contend that, therefore, the question of the sufficiency of the evidence is not before this court. Such is the rule and no citation of authorities is necessary.

The defendants contend, however, that it is not necessary to file objections or exceptions to the master's report where there is no dispute as to the facts and the conclusion of the

[illegible]

On November 2, 1932, the court entered an order directing the receiver to pay the \$200 in full to the intervenor, to apply on account of the judgment recovered by him in the consolidated suit of Chicago against Edward J. Bradley and Joseph Bradley, and the court further found and adjudge, entered judgment to Herman J. Landfield was without consideration, the directed that defendant's petition be dismissed with cost of suit.

The defendant further admitted that the evidence in the case is insufficient to justify the entry of the order, and that the court erred in directing the receiver to take the case to trial over to Adolph Rammell, the interest rate, the sum of \$480,000 in the receiver's hands.

[illegible]

There is no dispute as to the facts and the documentation of the
to file objections or amendments to the patent's patent claims
The defendant's motion, however, that it is not necessary

master is contrary to law, and cite Von Platen v. Winterbotham, 203 Ill. 198; Hurd v. Goodrich, 59 Ill. 450; Von Tobel v. Ostrander, 158 Ill. 499. The sufficiency of the evidence, however, must be considered in order to determine whether or not the master's conclusions as to the law are supported by the evidence in the record, and unless objections are made and exceptions taken, this court will not consider the sufficiency of the proof to sustain the master's conclusions.

The defendants consider it necessary that the court determine from the facts whether the order before the court is sustained by the proof. That it is, is clear from the contention of the defendants that the evidence sustains their theory that the assignment to Landfield was supported by a valuable consideration and that the master's conclusion is contrary to the evidence that there was want of consideration for the assignment. The defendants have pointed out the evidence that they consider sufficient to support a consideration for the assignment. It follows, therefore, that consideration of the question of sufficiency of the evidence is necessary in order to determine whether or not the assignment was based upon a valuable consideration. This court will not consider the sufficiency of the evidence for the reasons above stated. Where no exceptions are taken, the master's report is conclusive of the questions of fact covered by it. Sheltenham Improvement Co. v. Whitehead, 128 Ill. 279; Marble v. Thomas, 178 Ill. 540.

It is next contended by the defendants that the court erred in failing to confirm the master's report for several reasons: First, that the amount due on the judgment entered in the Municipal Court of Chicago was reduced to \$720, and the

of the record to maintain the master's confidential
existence, this court will not consider the public
evidence in the record, and unless otherwise stated, the
not the master's confidential as to the law and order of the
however, that be considered in light of the master's confidential
Gastner, 122 Ill. 428. The evidence in the record,
122 Ill. 428; and v. Gastner, 122 Ill. 428; and v. Gastner,
master is contrary to law, as with the master's confidential

[illegible]

It is now requested by the National All India Congress Committee that the Government should consider the possibility of appointing a committee to inquire into the activities of the various political parties in the country.

order entered by the court directs the receiver to pay \$750 - the amount in the hands of the receiver - to Adolph Hammel, which amount is more than the sum due.

It appears from the record that the amount of the master's fees, \$28.80, together with interest at the rate of five per cent per annum fixed by law upon the amount of the judgment from the date of the entry of the judgment, was more than sufficient to justify the allowance by the court.

The next reason advanced is that an execution issued upon the judgment was not served by the bailiff upon the defendants, and therefore was not a sufficient basis upon which to predicate a garnishment proceeding. Apparently, the defendants overlooked the fact that the intervener amended his petition so that the relief prayed for by him was that the court direct the receiver to pay the intervener, or his solicitors, the sum of \$750, and not for leave to serve garnishee summons on the receiver.

The final reason advanced is to the effect that the assignment by the defendants to Herman G. Landfield was prior in point of time to the filing of the final petition by Hammel. Having considered the question raised by the defendants that the assignment was based upon a valuable consideration, and having reached a conclusion contrary to the contention of the defendants, it will not be necessary to consider the above question.

In the opinion of the court the errors contended for are not such as would justify a reversal of the order. The order is therefore affirmed.

ORDER AFFIRMED.

HILL, P. J. AND WILSON, J. CONCUR.

order entered by the court directed the receiver to pay \$200 -
the amount in the hands of the receiver - to John Marshall,
which amount is more than the sum due.

It appears from the record that the amount of the
master's fees, \$28.90, together with interest at the rate of
five per cent per annum fixed by law upon the amount of the
judgment from the date of the entry of the judgment, was more
than sufficient to justify the allowance by the court.

The next reason advanced is that an execution issued
upon the judgment was not served by the sheriff upon the delin-
dents, and therefore was not a sufficient basis upon which to
proceed with a garnishment proceeding. Apparently, the defendant
overlooked the fact that the intervenor presented his petition so
that the writs prayed for by him were that the court direct the
receiver to pay the intervenor, or his solicitors, the sum of
\$200, and not for leave to serve garnished persons on the receiver.

The final reason advanced is to the effect that the
assignment by the defendants to Marshall, which was made in
point of time to the filing of the final petition of Marshall.
Having considered the question raised by the defendants that the
assignment was based upon a valuable consideration, and having
recorded a declaration contrary to the contents of the assignment,
it will not be necessary to consider the above question.

In the opinion of the court the above reasons are
are not such as would justify a reversal of the order. The
order is therefore affirmed.

ORDER AFFIRMED.

HILL, J. AND VILBUR, J. CONCUR.

36633

W. FRANCIS BURNS,

Appellee,

v.

OVSON EGG COMPANY, a
Corporation,

Appellant.)

131
APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

283 E. 630³

Opinion filed Feb. 7, 1934

MR. JUSTICE NEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment entered against it in favor of the plaintiff in the Superior Court of Cook County in the sum of \$895.30, in an action of assumpsit. The cause was tried by the court without a jury. The issue presented is whether the contract in question was an obligation of the defendant corporation.

The contract sued on is in writing, is set forth in the plaintiff's second amended count of the declaration, and is purported to be signed by J. B. Pherigo, the secretary of the defendant corporation. The execution and delivery of this contract is denied by a verified special plea filed by the defendant on December 24, 1931, which is designated as a special plea to the third count of plaintiff's declaration. To this count there was also filed a plea of non-assumpsit and an affidavit of merits as part of defendant's defense, which is: "That the person who signed the alleged contract with the plaintiff did not have the authority to bind the corporation to such a contract." On February 20, 1932, defendant's demurrer to the second count of the plaintiff's declaration was sustained, and thereafter an amended second count was filed by the plaintiff, which is substantially in words as follows:

"That on the 16th day of July, A. D. 1928, the defendant, Ovson Egg Company, a corporation, formerly known as Morris Ovson Company, a corporation, and by due proceedings pursuant to statute changed its corporate name to Ovson Egg Company, a corporation, desiring to engage the services of the plaintiff, W. Francis Burns, in manner and form as hereinafter set forth, made, executed and delivered its certain contract in writing, in words and figures as follows, to-wit:

MEMORANDUM OF AGREEMENT - July 16, 1928 - Entered into Between W. Francis Burns of Chicago, Illinois, party of the second part.

Witnesseth. One. Party of the first part agrees to prosecute for the Morris Ovson Company, parties of the second part its protest against the findings by Internal Revenue Agent and the Income Tax Unit, proposing additional taxes and penalties against the Morris Ovson Company for years 1922, 1923, 1924, and 1925, as evidenced by letters from the Income Tax Unit, dated May 3, 1928.

| YEAR | ADDITIONAL TAX | PENALTY | TOTAL |
|------|-----------------|---------------|-----------------|
| 1922 | \$ 540.38 | \$ 270.19 | \$ 810.57 |
| 1923 | 507.67 | 253.84 | 761.51 |
| 1924 | 499.37 | 273.82 | 773.19 |
| 1925 | <u>1,977.08</u> | <u>992.74</u> | <u>2,969.82</u> |
| | \$3,524.50 | \$1,790.59 | \$5,315.09 |

And all accrued interest on above taxes.

Two. Parties of the second part, Morris Ovson Company, agrees to compensate the party of the first part as follows:

(a) Upon completion of the case a net fee of 50% (fifty percent) of the reduction or the elimination of the proposed tax as covered by the years above, including accrued interest.

MORRIS OVSON COMPANY
By J. B. Pherigo,
Taxpayer.
W. Francis Burns,
Agent."

It also was alleged in substance that the defendant agreed to pay the plaintiff the fee provided for, and the plaintiff performed the services required under the contract; that on July 10, 1930, the United States Board of Tax Appeals entered an order in the matter of the protest filed by the plaintiff as to the sum of \$1,790.59, which was not allowed as a penalty and which was accepted by the defendant, and thereby the defendant became indebted under the terms of the contract in the sum of \$895.30. The declaration was verified by and on behalf of the plaintiff. Upon this state of the pleadings the case was tried by the court and judgment was entered for the plaintiff, which was appealed from, as we have already indicated in this opinion.

The principal contention of the defendant is that the court erred in admitting in evidence the contract sued on under the pleadings over the objection of the defendant; that the proof offered by the plaintiff did not establish the authority

into between
of the second part.
to present for the service
second part the present
and the income
and the income
from the income tax bill, dated July 2, 1928.

| YEAR | ADDITIONAL TAX | TOTAL |
|------|----------------|-----------|
| 1923 | \$540.58 | \$540.58 |
| 1924 | 307.87 | 848.45 |
| 1925 | 432.37 | 1,280.82 |
| 1926 | 1,077.08 | 2,357.90 |
| 1927 | 13,244.85 | 15,602.75 |

and all received interest on these taxes.

Two.
to compensate the party of the first part as follows:

(1) Upon completion of the case a review of the
of the reduction in the
tax is covered by the
by
by
by

It also was alleged in
to pay the plaintiff the
between the services rendered under the contract; that on July
10, 1923, the United States
in the matter of the protest filed by the plaintiff as to the sum
of \$1,750.00, which was not claimed as a penalty and which was
received by the defendant, and thereby the defendant became indebted
under the terms of the contract in the sum of \$27.00. The defendant
action was verified by and on behalf of the plaintiff. Good faith
state of the plaintiff the case was tried by the court and judgment
was entered for the plaintiff, which was appealed from, as by brief
already included in this opinion.

The principal objection of the defendant is that the
court erred in refusing to advance the cost of suit on motion
the plaintiff over the objection of the defendant; that the
proof offered by the plaintiff did not establish the authority

of the defendant to sign the contract on behalf of the defendant corporation.

It is in evidence that J. B. Pherigo, as secretary and treasurer of the corporation, signed the contract of employment, and, further, signed the power of attorney on behalf of the corporation empowering the plaintiff to appear for the defendant in regard to the tax matter in the case of Morris Ovson Egg Company vs. The Commissioner of Internal Revenue, pending before the United States Board of Tax Appeals, and the plaintiff performed the services required under the contract sued upon, and completed his work and effected as a saving the sum of \$1,790.59, which is evidenced by the decision of the United States Board of Tax Appeals. This is not disputed by the defendant, except that the tax was not paid by the defendant corporation, but was paid by the officers and directors of this company. The United States Board of Tax Appeals fixed the amount of the tax against the defendant corporation, and whether the defendant itself paid the tax is unimportant. The defendant attempted to shift its burden by charging that its officers and directors had entered into a conspiracy to defraud the defendant company by not accounting for the moneys received from the sale of empty egg cases and cartons, the property of the defendant. The plaintiff in this case rendered services, and as a result, the defendant was not required to pay a penalty amounting to the sum of \$1,790.59. It appears from the evidence that the officers had knowledge of this tax matter. In fact, the plaintiff was retained by the secretary and treasurer of this company to appear, according to the contract, before the United States Board of Tax Appeals.

The defendant corporation, however, contends that it did not have knowledge of any kind of the pending tax litigation. This is a rather peculiar contention to make. It would seem

of the defendant to sign the contract on behalf of the defendant corporation.

It is in evidence that J. E. Spaulding, Secretary and Treasurer of the corporation, signed the contract of employment, and, further, signed the power of attorney on behalf of the corporation empowering the plaintiff to appear for the defendant in

regard to the tax matter in the case of *Spaulding v. Germany v. The Commissioner of Internal Revenue*, pending before the United States Board of Tax Appeals, and the plaintiff performed the services required under the contract of employment, and completed his work and effected a saving the sum of \$1,750.00, which is evidenced by the decision of the United States Board of

Tax Appeals. This is not disputed by the defendant, except that the tax was not paid by the defendant corporation, but was paid by the officers and directors of said company. The United States Board of Tax Appeals found the amount of the tax to be the defendant corporation, and ordered the defendant to pay the

the tax is undisputed. The defendant attempted to shift the burden by charging that the officers and directors had entered into a conspiracy to defraud the defendant company by not accounting for the money received from the sale of stock and bonds, and

the property of the defendant. The plaintiff in this case produced evidence, and as a result, the defendant was not required to pay a penalty amounting to the sum of \$1,750.00. It appears that

the evidence that the officers and directors of this company, in fact, the plaintiff was not paid by the company and the company of this company to account, according to the plaintiff, before the United States Board of Tax Appeals.

The defendant corporation, however, contends that it did not have knowledge of any kind of the pending tax litigation. This is a typical peculiar contention to make. It would seem

from the evidence that the officers of the corporation had knowledge of the pending litigation, and if they had knowledge, the defendant is chargeable with knowledge. This suggestion made by the defendant is but a quibble and is added to give the appearance of confidence by the defendant in its position. However, as we have already indicated, it would seem to this court that such suggestion is but a sham. The proof of the execution of the plaintiff's contract was not required, because the defendant did not deny the execution of the contract by a verified plea to the second amended count. Still this court is of the opinion that the evidence is sufficient to establish execution by an officer of the defendant corporation, of which it had full knowledge.

While it is true that the corporation has changed its name, that fact of itself does not relieve the defendant from the liability incurred by this contract. The evidence justifies the judgment, and there is no error apparent which would justify a reversal. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

HALL, P. J. AND WILSON, J. CONCUR.

from the evidence that the officers of the corporation had knowledge of the pending litigation, and if they had knowledge, the defendant is liable with knowledge. This suggestion was by the defendant is but a quibble and is not to give the appearance of confidence by the defendant in its position. However, as we have already indicated, it would seem to this court that such suggestion is but a sham. The result of the execution of the plaintiff's contract was not required, because the defendant did not deny the execution of the contract by a verified plea to the second amended count. Still this court is of the opinion that the evidence is sufficient to establish execution by an officer of the defendant corporation, and which is not full knowledge.

While it is true that the corporation has changed its name, that fact of itself does not relieve the defendant from the liability incurred by this contract. The evidence justifies the judgment, and there is no error apparent which would justify reversal. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

DAVE, J. J. AND VITCHE, J. CONCUR.

36643

B. GIVEN,

Appellant,

v.

SAM HARTZEN,

Appellee.

132 7
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.H. 630⁴

Opinion filed Feb. 7, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The judgment for the defendant is here on appeal by the plaintiff and was entered in a suit to recover the amount due the plaintiff for rent of the premises occupied by the defendant and located at 5233 Prairie Avenue, Chicago, Illinois, for the months of June to December, 1932, inclusive, at a monthly rental of \$45, less the sum of \$180 deposited with the plaintiff to secure the payment of rent due under the lease.

The defendant did not appear in this court and file a brief.

The evidence is to the effect that the defendant entered into possession of the premises under an assignment by one Ely Fox, dated January 26, 1931, of a lease expiring April 30, 1932; that the plaintiff is the assignee of the former lessor P. J. Donohue, receiver, under an assignment dated September 1, 1931; that the defendant vacated the premises on October 10, 1932; that the defendant transacted his business with one Harry Shlensky, who was the plaintiff's agent, and the defendant paid rent to this agent during the period that rent was paid; that no notice that the defendant would vacate the premises upon the expiration of the lease on April 30, 1932, was served by the defendant on the plaintiff or his agent; that the premises vacated by the defendant was subsequently rented on the first day of January, 1933, by the plaintiff, and the plaintiff contends that there is due to the plaintiff the balance of \$135, due for accrued rent after allowing the defendant a credit of \$180, the amount deposited with the plaintiff as security.

E. OLIVER,

Defendant,

v.

THE BANKING,

Plaintiff.

Opinion filed Feb. 7, 1934

MR. JUSTICE ROBERT H. HENRY delivered the opinion of the court.

The judgment for the defendant is based on the fact that

plaintiff and was entered in a suit to recover the amount due the

plaintiff for rent of the premises occupied by the defendant and

located at 2337 Prairie Avenue, Chicago, Illinois, for the months of

June to December, 1932, inclusive, at a monthly rental of \$25, less

the sum of \$100 deposited with the plaintiff to secure the payment

of rent due under the lease.

The defendant did not tender in this court and file a

plea.

The evidence is as follows: That the defendant executed

and possession of the premises under an assignment by the plaintiff,

dated January 15, 1931, of a lease running until 31, 1933; that the

plaintiff is the assignee of the lease; that on January 1, 1931, the defendant

under an assignment dated September 1, 1931; that the defendant

vacated the premises on October 15, 1932; that the defendant presented

his business with one Harry Shinsky, and was the plaintiff's agent,

and the defendant paid rent to said agent during the period from 1931

and paid; that no notice that the defendant would vacate the premises

upon the expiration of the lease on April 30, 1933, was given by

the defendant on the plaintiff or his agent; that the witness vacated

by the defendant was subsequently rented on the first day of January,

1933, by the plaintiff, and the plaintiff's evidence that there is no

to the plaintiff the balance of \$100, and the defendant paid after

allowing the defendant a credit of \$100, the amount deposited with

the plaintiff as security.

This action by the plaintiff against the defendant is upon the theory that the defendant was liable as a holdover tenant for a period of one year under the same terms and conditions as of the expired lease.

The evidence of occupancy of the premises by the defendant after the expiration of the written lease and until he vacated the premises on October 10, 1932, is not in dispute. The defendant paid the May rent, and is in default in payment for the months of June to December, 1932, inclusive.

The only theory of the court for the entry of the judgment was that the agency of the witness Shlensky for the plaintiff was not established by the evidence. Even if the court was not satisfied that the evidence established agency, still the defendant was liable at least for the occupancy of the premises, less any credit that the defendant was entitled to from the plaintiff.

For the reasons stated in this opinion, there will have to be a new trial, and this court expresses no opinion as to whether the evidence establishes that the defendant was a holdover tenant for a period of one year, or whether he was a tenant from month to month.

Upon the questions of fact the court erred in finding for the defendant and against the plaintiff, and the judgment is reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND
CAUSE REMANDED.

HALL, P.J. AND WILSON, J. CONCUR.

for a period of one year under the same terms and conditions as of when the theory that the collection was illicit was published in 1961. This article of the illicit collection was published in 1961.

The evidence of ownership of the property of the estate and after the expiration of the period I shall be required to pay to the estate on October 17, 1937, in full in discharge of the debt, and in full in discharge of the debt of said the day, and in full in discharge of the debt of said the day, 1937, 1937, 1937.

that the defendant was entitled to have the right to

the evidence established that the defendant was a religious convert for a period of one year, or whether he was a person who came to work to be a new trial, and that could be expressed as a matter of fact for the reasons stated in this opinion, there will have

Upon the question of how the Government should proceed for the defense and security of the United States, the Government is authorized and the same remains for a law.

37214

THE WEST SIDE TRUST & SAVINGS BANK OF
CHICAGO, a Corporation, as Trustee
under Trust Deed dated July 10, 1927
and recorded as Dec. No. 10430628,

Appellees,

v.

ANNA WERSHKOFF, et al.,

Defendants

On appeal of ANNA WERSHKOFF,

Appellant.

INTERLOCUTORY

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

273 L.A. 630⁵

Opinion filed Feb. 7, 1934

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This cause comes to this court upon an interlocutory appeal from an order entered on September 8, 1933, appointing a receiver for the premises described in the bill of complaint before service of summons or answer filed by the defendants.

On August 25, 1933, the complainant filed its bill to foreclose the trust deed securing certain bonds described therein and for the appointment of a receiver. The complainant is trustee under the terms of the trust deed dated July 10, 1927. From the bill of complaint it appears that on July 10, 1927, the defendant Anna Wershkoff, being indebted in the sum of \$45,000, executed sixty-five bonds aggregating said sum, and that certain of said bonds matured yearly, commencing July 10, 1930, and ending July 10, 1935; that the trust deed securing said bonds was recorded on July 17, 1927; that bonds Nos. 1 to 4 inclusive for the principal sum of \$500 each and all interest thereon, which matured on or prior to January 10, 1933, were paid; that the payment of bonds Nos. 5, 6, 7 and 8, which matured July 10, 1933, in the sum of \$500 each was in default; also the interest on bonds Nos. 5 to 65, and the payment of taxes; that said defaults continued for over twenty days and still continue; that on

THE COURT HAS CONSIDERED THE
MATTER AND HAS DECIDED IN FAVOR
OF THE PLAINTIFFS.

IT IS SO ORDERED.

7.

1934 FEBRUARY 7, 1934

RECEIVED

ON BEHALF OF THE PLAINTIFFS

BY

Opinion filed Feb. 7, 1934

1. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

2. THIS COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

3. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

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17. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

18. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

19. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

20. THE COURT HAS CONSIDERED THE MATTER AND HAS DECIDED IN FAVOR OF THE PLAINTIFFS.

August 8, 1933, a written notice was served on the complainant in accordance with the terms of said trust deed, by a legal holder of one or more of said bonds, which notice set forth the defaults above mentioned, and by reason thereof, complainant as trustee declared the entire amount so secured immediately due and payable.

It also appears that the defendant Anna Wershkoff executed the trust deed conveying to the complainant as trustee the real estate described in the bill of complaint, and also the rents, issues and profits thereof, and that the persons named in the bill were made defendants; that the premises sought to be foreclosed consists of a three story brick apartment building, occupied by tenants.

This bill of complaint is not sworn to.

On August 28, 1933, the complainant filed its petition under oath by leave of court first had, praying for the appointment of a receiver, which motion was continued until September 8, 1933.

On September 8 the defendants Anna Wershkoff, Ida Wershkoff, and Sam Wershkoff filed their appearance and their written motion to strike the petition filed by the complainant, which motion was denied by the court.

From the petition it appears that the complainant is trustee under the trust deed sought to be foreclosed, which trust deed bears date July 10, 1929, and is recorded, and that the complainant filed its bill to foreclose the lien of the trust deed on the premises located at the northeast corner of Lawndale and 13th street in Chicago, Illinois; that the indebtedness secured by the trust deed is in the sum of \$45,000; that the time of payment of this amount has been accelerated because of defaults, that prior thereto \$2,000 had been paid on account of the principal, and the remaining \$43,000 is due and unpaid; that on January 10, 1933, interest in the sum of \$1,290 on all bonds outstanding matured, on which was

August 8, 1933, a written motion was served on the defendant in accordance with the terms of said order, by a legal notice of the date of said court, which notice set forth the substance of the motion, and by reason thereof, complaint was returned. The entire record so returned is attached hereto and hereto.

It also appears that the defendant and counsel requested the first bench appearing to the complaint to return the writs described in the bill of complaint, and also the writs, and writs thereof, and that the persons named in the bill were made defendants; that the premises sought to be foreclosed consisted of a three story brick apartment building, situated on the corner of ... This bill of complaint is not sworn to.

On August 20, 1933, the complaint filed in the ... with by leave of court first had, praying for the appointment of a receiver, which motion was continued until September 8, 1933. On September 8 the defendants were served with the complaint, and the receiver filed their appearance and their answer to the complaint, which answer was filed with the court.

From the petition it appears that the complaint is ... under the first bench sought to be foreclosed, which bench ... to the July 10, 1932, and is returned, and that the complaint ... the bill to foreclose the lien of the first bench on the premises located at the ... in Chicago, Illinois; that the interest ... in the sum of \$45,000; that the ... has been executed in the name of ... on account of the principal, and the ... is due and unpaid; that on January 10, 1932, interest in the sum of \$1,200 on all ...

paid the sum of \$1,190; that thereafter on July 10, 1933, interest in the sum of \$1,290 on all bonds outstanding matured; that the makers of Bonds Nos. 5, 6, 7, and 8 in the sum of \$500 each refused to pay said bonds, and also refused to pay the interest which had accrued.

It also appears from the petition that the premises in question are improved with a three story brick building with an English basement containing three five-room apartments, nine four-room apartments and two shops; that the premises are worth less than the amount of the first mortgage; that the petitioner caused an appraisal to be made of said property, and it appears therefrom and the petitioner therefore states the fact to be that said property is worth only \$30,000, and is therefore greatly inadequate for the payment of the indebtedness due under said mortgage; that numerous persons are occupying the premises who are paying rent which should be applied against this said indebtedness; that the legal title to said premises is vested in the West Side Trust and Savings Bank of Chicago, as trustee under Trust No. 146.

It also appears from the petition that the taxes for the year 1927 upon said property amount to \$1,408.27, upon which has been paid on account the sum of \$537.60, leaving a balance due of \$810.67; that the 1928 taxes upon said property amount to \$1,237.09, upon which has been paid on account the sum of \$500, leaving a balance of \$737.09; that the 1929 taxes upon said property amount to \$1,355.55, and that the 1930 taxes upon said property amount to \$1,479.19; that the 1931 taxes and the amounts above stated are unpaid.

The defendant Anna Wershkoff contends that the appointment of a receiver before answer filed is erroneous in the absence of an affirmative showing of an emergency. She agrees with the suggestion that the chancellor should exercise caution in the appointment of a receiver, and that the motion for the appointment is addressed to

[illegible]

the sound discretion of the court. The defendant here entered her appearance, together with other named defendants, and appeared before the chancellor and moved to strike the petition of the complainant, and to deny complainant's motion for the appointment of a receiver. Arguments of their solicitors were heard by the court, and after consideration, the motion of the defendants to strike the petition filed herein and to deny the motion for the appointment of a receiver were denied. This appears from the order of the chancellor in the record. This defendant, being before the court and taking an active part at the time the motion for the appointment of a receiver was heard by the court, is not in a position to complain of the appointment, as we view the proceeding.

It is further urged by the defendant that the bill of complaint must be verified and that before answer filed, the court cannot consider a petition or affidavits filed by the complainant in support of its motion, but the court must look to the bill alone. We are unable to agree with this contention. When a bill of complaint is not verified the court may hear the testimony of witnesses in support of the charges contained in the bill of complaint and determine from the evidence whether the charges justify the appointment of a receiver - provided, of course, that the provisions of the statute are complied with at the time the appointment is made. If a verified bill of complaint can be considered in the making of such appointment, then the evidence to support the bill of complaint may be heard by the court, whether it be the testimony of witnesses or affidavits in support of the charges contained in the bill. No law has been called to our attention providing that before an appointment can be made under circumstances such as in this case, the court is limited to the consideration of a verified bill of complaint. The defendant here on appeal appeared and was represented, and, from the record, took an active part when the motion for the appointment of

a receiver was heard. Upon hearing the motion, the court properly considered the verified petition of the complainant in support thereof, and the action of the court was not erroneous as suggested by the defendant.

It is further contended by the defendant that the bill of complaint is faulty in that the bill does not disclose the beneficial owners of the bonds claimed to be secured by the trust deed sought to be foreclosed, who, in any event, are necessary parties. The bill of complaint upon that question states:

"That the holders and owners of said bonds are numerous and scattered; that complainant has no interest in the premises sought to be foreclosed, nor in the bonds secured by said trust deed, which will conflict with the interest of any holder or owner of any of said bonds and files this bill for the use and benefit of each owner and holder of said bonds and interest coupons so secured."

In the opinion of this court, the charge is sufficient for the purpose of the bill; that the bill of complaint is sustained by the sworn petition, and that there is a default in the payment of matured principal and interest; that the amount of the bonds secured by the trust deed is \$43,000; that the value of the property is \$30,000; that taxes for the years 1927, 1928, 1929, and 1930 are in default in the amount of \$4,382.50; and from the facts in the petition this property is subject to a proceeding upon application of the County Treasurer of Cook County, in which a receiver may be appointed to collect the rents, income and profits from said premises, to be applied in the liquidation of the unpaid taxes, as provided for by Ch. 120, Par. 268, Sec. 253 Cahill's Rev. St. 1933.

These facts, in our opinion, surely warrant the appointment of a receiver.

The defendant complains that the bond given by the complainant, as required by the order for the appointment of a receiver, does not comply with the direct requirements of Ch. 22, Par. 55 of

Cahill's Rev. St. 1933. If the defendant desired that the bond be corrected, then it was her duty to make application to the court calling attention to the conditions as they appeared in the bond. The defendant not having done so, the approval of this court was not erroneous. The statute provides, in substance, that bond shall be given to the adverse party conditioned to pay all damages, etc., in case the appointment of such receiver is revoked or set aside. Ch. 32, Sec. 55, Cahill's Rev. St. 1933.

As we have already indicated in this opinion, the case was a proper one for the appointment of a receiver, and there could be no recovery by the defendant upon the bond, if one had been given and approved. Therefore, the order will not be set aside or revoked.

Other objections are called to our attention, but as they deal with the merits of the controversy and should properly be heard by a chancellor upon a final hearing, they will not be considered by this court. The appeal is interlocutory, and the purpose of the act permitting such appeal is not that the Appellate Court should be required to pass upon the merits of the litigation.

The motion of the complainant to dismiss the appeal was reserved to the hearing, but in view of our conclusion upon the merits, the motion is denied.

For the reasons stated in this opinion, the order appointing a receiver is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND WILSON, J. CONCUR.

35191

MARGARET HILLS,

Appellee,

v.

CHICAGO MOTOR COACH CO., a
corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

273 I.A. 631¹

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff Margaret Hills recovered a judgment in the sum of \$2,500 against the Chicago Motor Coach Company, as a result of injuries sustained while she was in the act of entering one of the motor coaches of the defendant company on Sacramento avenue near Washington boulevard in Chicago about 10:30 o'clock in the evening on January 30, 1932. This cause is before us on an appeal from that judgment.

The declaration which consisted of one count alleges that the defendant was engaged in the business of operating motor coaches in Chicago for the conveyance of passengers for hire and was on January 30, 1932, operating one of its coaches on Sacramento avenue near its intersection with Washington boulevard; that the motor coach was under the care of a driver who was a servant of the defendant company and the plaintiff was invited to and accepted an invitation to become a passenger and was in the act of entering said vehicle and was at the time in the exercise of reasonable care for her own safety; that it became the duty of the defendant to exercise the highest degree of care and caution for the safety of passengers consistent with the practical operation of the means of conveyance adopted, but failed to exercise that degree of care; that on the other hand, defendant so negligently and carelessly operated said vehicle that it was caused and permitted to move; that by reason thereof plaintiff's foot and ankle were caught beneath a wheel of said vehicle and injured.

Upon the trial and at the close of plaintiff's evidence, defendant made a motion for a directed verdict on the ground of variance. This motion was based on the fact that the declaration charged that she was injured while in the act of entering the motor coach, whereas, the proof showed that she was injured after the motor coach had come to a full stop and while she was upon the ground underneath the coach. Plaintiff asked leave to amend her declaration, which was granted, and thereupon the declaration was amended by striking out the words, "as the plaintiff was entering therein" and substituting therefor the words, "after the same had stopped to permit the plaintiff to enter therein."

A consideration of the declaration as amended is important, inasmuch as it removes from the case any consideration of the question of negligence on the part of the defendant while the plaintiff was in the act of boarding the motor coach. The ground of recovery is narrowed to the question as to whether or not after the coach had stopped and after the plaintiff had slipped and fallen underneath the coach, the driver was negligent in permitting it to move backward so as to cause the injury in question. This contention of plaintiff is clearly contained in the statement of her counsel made at the time the motion for a directed verdict was made by the defendant.

Mable Hills, the daughter of the plaintiff, who was with her at the time of the accident, testified that she was 35 years of age and lived with her mother; that she was with her mother at the time of the accident; that she and her mother had been at a meeting and had left about 10 o'clock; that this meeting was on Washington boulevard between California and Washtenaw, east of Sacramento avenue; that they went west on Washington boulevard from the hall to California avenue and Washington boulevard where they waited for the bus which they boarded and she paid the fare for her mother and herself and they proceeded to Sacramento avenue where they alighted

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of the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Communist Party in the United States. The Commission has been informed that the Government of the United States has been informed that the Communist Party has been active in the United States and that the Government of the United States has been informed that the Communist Party has been active in the United States.

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in order to transfer to the bus involved in this accident; that she received transfers from the conductor on the first bus; that they signaled the Sacramento Boulevard bus as it came along; that there was a very bad snowstorm on that night and they had waited about 15 minutes; that there was another woman waiting at the time; that the bus stopped at a place approximately two feet from the curb; that when the bus came up the door was open and her mother reached out her hand and got hold of the handle of the bus and put her foot upon the step and then slipped; that there was ice on the step and she slipped under the bus with both feet and legs, but her head and shoulders did not go under; that when she was under the bus it was moving; that the bus was a northbound bus but was moving south, it moved 4 or 5 inches; that she tried to pull her mother from under the bus but she was unable to do so because her mother's foot was caught under the front wheel. On cross-examination the witness stated that when the bus stopped her mother was right in front of the door and did not have to walk any distance to get to it and that the door was open at the time she put her hand on the rod; that after the bus stopped the door opened and a few seconds elapsed from that time until the time her mother fell; that at the time her mother fell the bus was standing still.

Margaret Hills, the plaintiff, testified that she was 66 years of age; that when the bus came along it stopped and the door opened and she caught hold of the rod; that there was quite a little snow on the ground and that she had to make a step and she put her right foot on the step, which was slippery, and she slipped under the bus; that she did not feel any pain until the wheel of the bus came back two or three inches, when she felt the pain in the ankle of her right foot; that the bus was standing still when she was in the act of entering it.

Dr. Magnuson, a physician who attended the plaintiff, testified as to the extent of the injuries. He was asked on direct examination as to what sort of injury would have to occur to produce a condition such as was found in the patient, and answered: "The injury occurs as a result of a twist with the foot fixed; I mean the foot caught in something and the leg twists." This testimony of the physician is quoted because of the fact that considerable stress is made in the argument to the effect that the injury must have resulted from the fall on the slippery street and not from the tire covered wheel of the bus.

At this point plaintiff rested and the defendant made its motion for a directed verdict, as a result of which the amendment to the declaration already referred to was allowed.

On behalf of the defendant the witness Reiner testified that he was an assistant to an executive of the Peoples Gas Company and that he was a passenger on the coach; that he was in a seat in the rear of the driver on the left-hand side of the coach and when the coach came up to its regular stopping place it made a stop; that the driver opened the door and that the people waiting were standing on a sort of snowbank and that the lady fell and that he and the driver were the first to pick her up; that the people were standing on this snowbank and there was a sort of incline down and her feet seemed to go out from under her just about under the position of the step of the coach; that he did not see her at any time put her foot on the step or put her hand on the handle; that the coach did not move after the plaintiff fell.

A witness Gistenson testified that he was an insurance salesman for the Mutual Life Insurance Company of New York; that he was a passenger on the coach and was sitting in about the second seat on the left hand side back of the driver; that the coach stopped and the driver opened the door and that there were a few people waiting on the sidewalk near the curb; that the plaintiff was

first in line and that she fell off the curbing and that he jumped to help and that she was right under the step of the coach; that when the bus pulled up at the corner the driver pulled the emergency and that the coach was at a standstill and did not move at all; that the plaintiff did not get on to any part of the step as he saw it.

A witness Mrs. Shuman testified that she was waiting for the bus and that there were two other women waiting at the same time and that when the bus came up it came to a stop and these two women walked ahead of her toward the bus; that it was very slippery and just as plaintiff reached the curb she immediately slipped right under the bus and her feet went between the platform and not anywhere near the front wheel, but just underneath the bus; that prior to the time she slipped she did not have her foot on the step nor her hand on the handle.

Hartrick, a witness for the defendant, testified that he was an engineer for the Chicago Motor Coach Company; that the step on the coach is twenty-eight inches wide and fifteen and one-half inches from the ground; that the door jack-knives in toward the front of the coach and that there is a handle inside the door and on the left side as you enter; that the step leading into the coach is 21 inches deep and that this part of the coach is called the well; that there is another step up to the floor of the coach; that the coach is twenty-six feet one inch long, and that the forward part of that step is thirty two and one-half inches from the center of the front wheel which was equipped with a pneumatic tire.

Mages, a witness for defendant, testified that he was the driver of the coach involved in the accident; that he came to a stop, put on his emergency brake and then opened the door; that the plaintiff started toward the coach but never touched it but slipped and went underneath; that as she slipped her foot was caught and kind of twisted; that his coach was well lighted and that he helped to pick up the plaintiff.

Mrs. Cedar, a witness for the defendant, testified that she was seated in the first seat on the right hand side of the coach which was traveling north on Sacramento avenue; that she saw the plaintiff come toward the bus and that she made a hurried step and her foot slipped off the curb; that she did not get to the step and when she slipped her feet went under the platform; that there was snow and ice on the street at the time. In rebuttal Margaret Hills testified that at the time of the accident she had on galoshes.

Plaintiff insists that at the time of the accident she was a passenger by reason of having a transfer and being in the act of boarding the motor bus. Reliance in support of this last proposition is on the case of Feldman v. Chicago Railway Co., 369 Ill.25.

It is also insisted that the doctrine of res ipse loquitur is applicable. With this last contention we are unable to agree.

The court in the case above referred to states the rule, as follows:

"When a thing which has caused an injury is shown to be under the management of the party charged with negligence and the accident is such as in the ordinary course of things will not happen if those who have such management use proper care, the accident itself affords reasonable evidence, in the absence of an explanation of the parties charged, that it arose from the want of proper care."

The accident involved in this case was one which does not ordinarily happen. It occurred in such a manner as to require proof of negligence on the part of the defendant. We agree with the rule in that case, however, that, at the time she presented herself for carriage as a passenger with a transfer slip entitling her to passage upon the motor bus, as a passenger, she was entitled to that degree of care which the carrier ordinarily owes to a passenger. The question in this case, however, is whether or not she presented herself in the manner which was required of her by law and also whether or not at the time of the accident she came within the meaning of the term "in the act of entering the motor coach for the purpose of becoming a passenger thereon." Defendant insists that because of the manner

of the accident she did not present herself in a proper manner to come within the rule laid down in Illinois Central R. Co. v. O'Keefe, 168 Ill. 115; C. & N. W. R. Co. v. Jennings, 130 Ill. 478; Devine v. Chicago City R. Co., 168 Ill. App. 243.

The court in the case of C. & N. W. R. Co., v. Jennings, supra, says in regard to the relationship of a carrier and passenger:

"He must be at some place under the control of the carrier and provided for passengers, so that it may exercise the high degree of care exacted from it; and the mere fact that an intending passenger has a ticket and intends to take a train does not create the relation of carrier and passenger."

In the case at bar it was not the negligence of the defendant alone which caused the accident. Neither can it be said as a matter of law that the plaintiff was guilty of contributory negligence. The defendant was not responsible for the storm nor the resulting condition which existed and caused the plaintiff to slip and fall underneath the motor coach. She did present herself as a passenger in the ordinary manner, but, nevertheless, the duty of the defendant did not cease if the driver of the bus knew or should have known that she was in a position of danger and carelessly and negligently operated the motor coach, so as to injure the plaintiff.

The weight of the evidence seems to indicate that the bus came to a stop before plaintiff attempted to board the coach and, up to this time, the defendant was guilty of no negligence. The declaration charges that the defendant, however, while plaintiff was in a position of danger, carelessly and negligently permitted the motor bus to back up and strike the plaintiff. Under the charge of the declaration and in view of the weight of the evidence, it was necessary that the court instruct the jury as to the duty of the defendant, with care and precision. Plaintiff's given instruction number 2, reads as follows:

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"2. The jury are instructed that if you believe from the evidence that the defendant, at the time and place of the accident in question, was engaged in the business of carrying on its motor coaches passengers for hire, and held itself out as ready and willing to carry on such motor coaches for hire any person who might apply for carriage thereon, and if you further believe from the evidence that at the time of the accident in this case the plaintiff was impliedly invited by the driver in charge of the defendant's coach to enter said coach as a passenger therein, and accepted said invitation and attempted so to enter said coach, then the defendant was required by law then and there to exercise for the safety of the plaintiff the highest degree of care, skill and diligence consistent with the practical operation of the defendant's motor coach; and if you believe from a preponderance of the evidence that the defendant failed to exercise such highest degree of care, skill and diligence, as charged in the plaintiff's declaration, and that the plaintiff, while she herself was in the exercise of ordinary care and caution for her own safety, was injured, as alleged in the plaintiff's declaration, as the proximate result of such failure on the part of the defendant to exercise that degree of care, skill and diligence required of it by law, then you should find the defendant guilty."

Under this instruction the jury were told that if they believed the defendant was engaged in the business of carrying passengers and invited the plaintiff to become a passenger and that she accepted the invitation and attempted so to enter said coach, then the defendant was required by law to exercise the highest degree of care for her safety consistent with the practical operation of the motor coach. This instruction was limited to the conduct of the plaintiff up to and during the time she attempted to enter the coach, whereas, in fact, at the time of the accident she was not attempting to enter, but had made the effort and failed, and the resulting duty of the defendant was to exercise due care not to injure her if it knew, or should have known, that thereafter she was in a position of danger.

In view of the fact that the weight of the evidence is to the effect that the motor bus did not move after it came to a stop and that the emergency brake was on, and that the fracture of plaintiff's limb may just as well have resulted from her fall as from the moving of the coach, we are of the opinion that the judgment should

be reversed and the cause remanded for a new trial. The jury may well have been misled by the instruction referred to and for that reason in our opinion the cause should be remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HALL, P.J. AND HENEL, J. CONCUR.

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36495

HELEN HAMMERSTEIN,

Defendant in Error,

v.

WALTER W. DUFT,

Plaintiff in Error.

135
ERROR TO

SUPERIOR COURT,

COOK COUNTY.

273 I.A. 631²

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

The plaintiff Helen Hammerstein obtained a judgment against the defendant Walter Duft in the Superior Court of Cook County because of personal injuries sustained by reason of an accident at the intersection of 95th street and Cicero avenue, also known as Illinois State Highway 46. The accident happened on the 26th day of August, 1929, in the afternoon and the plaintiff at the time was riding in the rear seat of a Hudson car driven by her husband Albert Hammerstein.

Ninety-fifth street at the point where the accident occurred was a 40 feet, four lane highway and was a through street. The place where the accident happened was located within the limits of the Village of Oak Lawn. Cicero avenue which intersects 95th street at this point is a State Highway and a through street by reason thereof, 40 feet wide and also a four lane highway. The car in which plaintiff was riding was proceeding in an easterly direction and at the corner of the intersection of 95th street and Cicero avenue, on the southwest corner, was a sign, "Route 46".

The defendant at the time of the accident was driving a Packard car and was on his way with three passengers from the Municipal Air Port, located at 63rd street and Cicero avenue, to Valparaiso, Indiana.

Under the statute concerning state highways, it is the duty of the State Highway Department to erect and maintain "Stop" signs on intersecting streets or highways so that persons approaching

1. The first part of the document is a list of names and addresses, which are arranged in a columnar fashion. The names are written in a cursive script, and the addresses are written in a more formal, printed style. The list includes names such as "John Doe", "Jane Smith", and "Robert Brown", along with their respective addresses.

Opinion filed Feb. 7, 1934

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height. The ridge was composed of an irregular, rounded, and
steep, 60 feet high and also a low, low mountain. The ridge was
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was a 1000 ft. ridge. The ridge was a 1000 ft. ridge.

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these highways may have warning of the fact that they are approaching a state highway and therefore should stop before entering upon it. Through mistake and inadvertence these "Stop" signs were placed upon Cicero avenue instead of upon 95th street. This was done about 8 days prior to the accident and were, after the accident, changed to 95th street in compliance with the statute. At the northwest corner of Cicero avenue and 95th street there was an old school house, with a few trees behind it, which interfered with the view of those approaching 95th street from the north and along Cicero avenue, and also those approaching Cicero avenue from the west along 95th street. The south line of this school house was about 45 feet north of the north line of 95th street and the east line of the school house was about 35 feet west of the west line of Cicero avenue.

There seems to be some dispute in the testimony as to whether Hammerstein, the driver of the car in which plaintiff was riding, was familiar with this particular point. At the time of the accident he was a resident of St. Louis, Missouri, and had lived there a little over a year. He stated that he had driven over 95th street quite often some years before, but did not remember ever having driven along Cicero avenue and did not know it was a section line street or a main traveled highway; that he did not observe any state marking signs on 95th street; that when he approached Cicero avenue he was going at between 30 and 35 miles an hour and that as he got about 200 feet from the intersection, he looked both ways and there were no cars in view approaching the intersection; that when he first saw defendant's car he Hammerstein was about 40 feet from the west curb of Cicero avenue and defendant's car appeared to be about 100 feet or so from 95th street and that defendant's car appeared to be going about 50 or 55 miles an hour and that he put on his brakes and at the time of the collision his, Hammerstein's, car had almost stopped and was not going faster than perhaps 5 or

These highways may have been used at the time that they are mentioned
a state highway and therefore should also be mentioned as such.
Through Alaska and Northwest Alaska (1900) there were several
upon those roads instead of now. The one from
it says that the road was not, after the railroad, changed
to both street in connection with the station. At the same time
corner of Alaska Avenue and 10th Street there was an old school
house, with a few trees behind it, which stood until the year 1911
thence, according to the street from the north and along Alaska Avenue,
and also those mentioned Alaska Avenue from the north along 10th
Street. The corner line of this school house was about 40 feet north
of the north line of 10th Street and 40 feet east of the school
house was about 30 feet west of the west line of Alaska Avenue.
There seems to be some doubt in the testimony as to
whether Government, the street of the year 1911 and
Alaska, was changed with this particular school. At the time of
the accident he was walking on the street, between 10th and
lived there a little over a year. He stated that at that time there
were street lights along Alaska Avenue, but did not remember ever
having lived along Alaska Avenue and did not know if there was a station
line street on a main traveled highway. There are two main streets
state walking along on 10th Street; that is, when he was walking along
avenue he was going to school to the 10th Street and back to
he got about 100 feet from the intersection, he looked into the
there were no cars in view, and he was looking for intersection; that is,
he first saw defendant's car in Government and about 10 feet from
the west end of Alaska Avenue and defendant's car was about 10 feet
about 100 feet or so from 10th Street and 10th Street's car
appeared to be going about 10 or 15 miles an hour and that he was
on his feet and at the time of the collision his Government's
car had almost stopped and was not going faster than 10 or 15

10 miles an hour; that just prior to the accident he attempted to swing his car south on Cicero avenue to avoid the collision.

Plaintiff testified that when she saw the defendant's car it was between 30 to 50 feet from the car in which she was riding and that it looked like a green flash.

Duft, the defendant, testified that as he approached 95th street there was another car ahead of him and Woltjen, a passenger riding with him, said there is a "Stop" sign at 95th street and thereupon he stopped; that the other car proceeded south on Cicero avenue along side of his car and, after a moments hesitation pulled ahead; that he then looked to the right and saw a car 350 or 400 feet away and he put his Packard in first speed and started forward and about half way across 95th street he saw the car coming from the right and immediately speeded up; that when he saw there would be a collision he put on his brakes; that his car at the time of the accident was in first gear and he was going about 15 miles an hour; that just prior to the accident he swerved to the left and was east of the middle line of Cicero avenue and that the other car started turning south; that the other car hit his front running board and that Hammerstein's car caromed off and came into the back end of defendant's Packard; that after the accident defendant's car went into a ditch and when it came to a stop it was about 50 feet south of 95th street.

Marie Slater, who was riding with the defendant on the day of the accident, stated that she did not remember whether defendant's car came to a complete stop at 95th street, but she looked to the right and saw a car coming at a terrific rate of speed.

Herman Woltjen, who was also riding with the defendant, testified that defendant's car stopped 75 to 100 feet north of 95th street and that there was a car ahead of them which had also stopped; that the car ahead of them proceeded to cross 95th street and

is also on hand; that just prior to the accident he attempted to
 return his car south on 10th Street to avoid the collision.
 Plaintiff testified that when he saw the defendant's car
 it was between 50 to 60 feet from the curb in which the car was riding
 and that it looked like a green limo.
 With the defendant, testified that as he approached
 this street there was another car ahead of him and told him,
 "Watch out, riding with him," said there is a "stop" sign at 10th Street
 and that he stopped; that the other car proceeded south on
 10th Street along side of the curb and, after a moment's hesitation
 pulled ahead; that he then looked to the right and saw a car 100
 or 150 feet away and he put his car in first gear and started
 forward and about half way across 10th Street he saw the car coming
 from the right and immediately stopped; that when he saw that
 would be a collision as was on his right; that his car is the size
 of the accident car in first gear as he was going south is also on
 hand; that just prior to the accident he was on the left and
 was east of the middle line of 10th Street when the other car
 started turning south; that the other car is the front wheel
 down and that defendant's car turned off and went into the ditch
 and of defendant's car; that after the accident defendant's car
 went into a ditch and when it was in a ditch it was about 50 feet
 south of 10th Street.
 While riding, she was riding with the defendant on the
 day of the accident, at that time she did not remember whether defendant
 and her car went to a warehouse 1000 ft 10th Street, but she looked to
 the right and saw a car coming at a terrific rate of speed.
 When called, she was also riding with the defendant,
 testified that defendant's car stopped 12 to 15 feet north of 10th
 Street and that there was a car ahead of them which had also stopped;
 that the car ahead of them proceeded to cross 10th Street and

defendant's car followed; that he then noticed the car in which plaintiff was riding about 300 feet away and coming at a fairly good rate of speed and that this car was increasing its speed and making no effort to stop and a few seconds later this car struck the car of the defendant between the front door and the fender. Then it caromed off and struck it again; that at the time of the accident defendant's car was in first speed and going at approximately from 15 to 18 miles an hour.

Rudolph Mason, a witness called on behalf of the plaintiff, testified that he lived in Indiana, but for about five months previous to that time had been a resident of Oak Lawn where the accident happened and still owned his own home in that village; that he was familiar with 95th street and Cicero avenue at that point; that just prior to the accident he was driving west on 95th street and had reached a point of about 150 feet from Cicero avenue; that on the day of the accident the weather was fair and the streets were dry and as he approached Cicero avenue he saw a car coming from the west along 95th street and also noticed a car coming from the north going south on Cicero avenue; that when he first noticed the car on Cicero avenue it was about 300 feet north of 95th street and was going between 50 and 55 miles an hour; that as it approached 95th street it did not slow down and did not stop; that when the car in which plaintiff was riding entered upon the intersection the car from the north hit it on the left front wheel and the car going east tried to turn to avoid the accident, but it was too late; that the Packard car owned by the defendant went southeast across the ditch and up against the guy line of the telephone pole, where it stopped. He also testified as did Hammerstein, that there was no other car near or ahead of the car of defendant.

Plaintiff's declaration contained six counts and charged general negligence on the part of the defendant in the operation of

testimony was followed; that he then noticed the car in which the witness was riding about 100 feet away and coming at a fairly good rate of speed and that this car was traveling in the same direction as the effort to stop and a few seconds later this car struck the car of the defendant between the front door and the trunk. It is estimated that the car was in first speed and going at approximately 15 to 20 miles an hour.

Joseph Mason, a witness called on behalf of the defendant, testified that he lived in Indiana, but for about five months previous to that time had been a resident of New York where the accident happened and still owned his home in that village; that he was familiar with 52nd street and various avenues of that district; that just prior to the accident he was driving west on 52nd street and had reached a point of about 100 feet from 52nd street; that on the day of the accident the weather was fair and the streets were dry and as he approached 52nd street he saw a car coming from the east along 52nd street and also noticed a car coming from the west along 52nd street on 52nd street; that when he first noticed the car on 52nd street it was about 100 feet west of 52nd street and was going between 50 and 55 miles an hour; that as it approached 52nd street it did not slow down and did not stop; that when the car in which the witness was riding entered upon the intersection of 52nd street the car was in the left hand lane and the car coming from the west to turn to avoid the accident, but it was too late; that the defendant was carried by the defendant's automobile across the street and was struck the guy line of the telephone pole, where it stopped. He also testified as did the defendant, that there was no other car near the point of the accident.

The defendant's testimony contained six oaths and charges of general negligence on the part of the defendant in the operation of

his machine; the violation of the statutes of the State of Illinois in the operation of a car at over 50 miles an hour within the limits of an incorporated village; and also wilful and wanton negligence.

A reversal of the judgment is asked; (a) on the ground that there was nothing in the evidence to show that the defendant was guilty of wilful and wanton negligence; (b) that the evidence shows negligence on the part of the driver of the car in which plaintiff was riding; (c) that there was no evidence showing that plaintiff was in the exercise of due care for her own safety; and (d) that the court erred in refusing defendant's instruction No. 1.

Defendant insists that he was driving upon a state highway, which gave him the right-of-way, and that even though there were "Stop" signs at the time of the accident upon said street at the intersection of 95th street and Cicero Avenue, the law gave him the right to proceed without stopping. Defendant also insists that even though there were no "Stop" signs on 95th at its intersection with Cicero avenue, the driver of the car in which plaintiff was riding was required under the law to stop and should have done so before entering upon the intersection of these two streets. It is unfortunate that the Highway Commission, through the highway police or otherwise, erred in placing the "Stop" signs upon the wrong highway. While the law gave the defendant the right-of-way at this particular point, nevertheless, it did not relieve him of the duty of so driving his car as not to injure others, nor can the plaintiff be entirely charged with the negligence of the person driving the car in which she was riding, but she is required to use only that care and caution for her own safety which a person in her position would use. Under this rule she is required to call the attention of the driver of the car to those facts which she knew or should have known which in her opinion might result in an accident if the driver of the car was not apprised thereof. She is not required to exercise the same diligence as the

driver of the car and her conduct must depend upon all the circumstances of the particular case. Christensen v. Johnston, et al, 207 Ill. App. 209; St. Clair Nat. Bank v. Monaghan, 258 Ill. App. 471.

The jury evidently believed the story of the disinterested witness Mason, according to whose testimony the defendant did not slow up at the crossing, but proceeded across 95th street at a rate of speed between 50 and 55 miles an hour. This rate of speed is contrary to the statute, and even though defendant may have had the right-of-way at the time, he also, if this evidence were true, was violating the Motor Vehicle Act in force in this state.

Defendant places considerable reliance upon the case of Popp v. Barger, 364 Ill. App. 484. An examination of the facts in this case, however, discloses a somewhat different situation. The driver of the car in that case saw the oncoming automobile of the defendant in time to have avoided the accident. The court in that case, moreover, expressly stated in his opinion that "No claim is made that appellant was operating his car at a high rate of speed". Nor does it appear that the defendant in that case was guilty of any negligence on his part." In the case at bar there is evidence to the effect that defendant was proceeding across the intersection at a high rate of speed and in violation of the statute. These were all questions of fact for the jury and the trial court. Evidently the jury was not impressed with the testimony of the defendant that he stopped before proceeding across the intersection and this is in part borne out by the fact that defendant's car ran across the street intersection, through a ditch and into a field and up against a guy wire on a telegraph pole before stopping after the accident. Moreover, the plaintiff's exhibit showing the Hudson car after the accident, discloses that it apparently was struck on the side rather than in front as would have been the case if it ran directly into the defendant's car as testified to by himself and his witnesses. This

driver of the car and the witness who testified at the trial
of the accident case. William T. Johnson, Jr.
107 Ill. App. 2d; Ill. App. 2d 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

court, moreover, has held in the case of Price v. Bailey, 265 Ill. App. 358, and again in the case of Lorraine Hawkins, a Minor, by James Hawkins her father and next friend, v. Edgar McGinn, Gen. No. 35384, Appellate Court of Illinois, First District, that where there is one good count in a declaration which charges both general negligence and wilful and wanton conduct, it is sufficient to sustain a verdict.

Defendant complains of the trial court in refusing to give a certain instruction on behalf of the defendant, which, in effect, told the jury that if the defendant was operating his car with due care and caution up to the time he observed plaintiff did not intend to stop, or in the exercise of ordinary care knew that plaintiff's car did not intend to stop and that thereafter the defendant did all any ordinary, reasonably prudent person would have done under the circumstances to avoid the accident in question under the same or similar circumstances, then they should find the defendant not guilty. It may well have been that even after the defendant observed the fact that the driver of the car in which plaintiff was riding did not intend to stop, it was impossible for the defendant to have stopped because of the rate of speed at which he was proceeding.

Twelve instructions were offered and given on behalf of the defendant. One of these instructions told the jury that the defendant had the right to assume that persons entering upon Highway No. 46 should come to a complete stop before so doing and that this right continued up to the time that he could see that such person did not intend to stop. Another instruction told the jury that the defendant had the right-of-way at this street intersection. Another instruction informed the jury that the defendant was only required to exercise ordinary care and diligence under all the circumstances to avoid the accident. Still another instruction informed the jury that

if both plaintiff and defendant were guilty of negligence contributing to the collision, then the plaintiff could not recover. The jury were very fully instructed as to the relative rights of the parties. We are of the opinion that the refusal of the trial court to give instruction No. 1 on behalf of the defendant, was not such error as to necessitate the reversal of the cause.

For the reasons stated in this opinion the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

it both directly and indirectly were guilty of negligence contrib-
uting to the collision, then the plaintiff could not recover. The
jury was very fully instructed as to the relative rights of the
parties. As one of the witnesses told the verdict of the trial court
to give instruction No. 1 on behalf of the defendant, was not such
error as to necessitate the reversal of the verdict.

For the reasons stated in this opinion the judgment of
the superior court is affirmed.

JUDGMENT AFFIRMED.

WALL, J. J. AND BROWN, J. CONCUR.

36614

MAX BERNSTEIN and J. A. ALBERT, for
use of LOUIS PORTMAN,

Defendants in Error,

v.

NEWART CO., a corporation,

Plaintiff in Error.

APPEAR TO

MUNICIPAL COURT

OF CHICAGO.

26514-631³

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review an order of the Municipal Court of Chicago in a garnishment proceeding denying the motion of the garnishee to vacate and declare void a judgment entered against it.

On November 2, 1931, Louis Portman recovered a judgment in the Municipal Court against Max Bernstein and J. A. Albert. Garnishment proceedings were instituted on this judgment against the Newart Co., the plaintiff in error herein, on February 15, 1932. An answer was filed by the garnishee, the Newart Co., alleging that it was not indebted to nor did it hold any property or chose in action belonging to the judgment debtors.

On April 15, 1932, at a hearing on the garnishee's answer, the court found that the garnishee was indebted to Bernstein, one of the judgment debtors, in the sum of \$170.00 and judgment was entered against the garnishee. On May 2, 1932, the garnishee, the Newart Co., presented its motion which is now before us, asking the court to vacate the judgment entered April 15, and presented a petition which alleged in substance that Bernstein, the judgment debtor, was employed on a salary and was the head of a family with whom he resided in the City of Chicago; that no demand in garnishment had been served upon the said Max Bernstein or the Newart Co., a corporation, as provided by section 14 of the Garnishment Act.

THE COURT OF APPEALS FOR THE SECOND CIRCUIT
IN NEW YORK

IN SENATE

Y.

RECEIVED BY THE COURT

FILED IN

Opinion filed Feb. 7, 1934

RE. THE ESTATE OF JAMES H. HARRIS, DECEASED.

This is a bill of exchange to enforce the will of the testator.

The Court of Appeals is a judicial body having the right

of the testator to receive and enforce his will and testament.

against it.

In January 1, 1931, James H. Harris executed a will

in the Municipal Court of New York City and County.

Testaments were introduced in this Court on January 1, 1931.

The Court of Appeals in this case, on January 1, 1931,

in answer was filed by the testator, the Court of Appeals.

It was not introduced by any bill or order or decree or

order relating to the judgment of the Court.

On April 1, 1931, it was decided by the Court of Appeals

that the Court of Appeals should have the right to enforce the will of the testator.

One of the judgments of the Court, in the case of 110.00 and judgment was

entered against the testator. On May 1, 1931, the Court of Appeals, the

Court of Appeals, entered its order which is now before the Court.

The Court of Appeals in this case entered its order on April 1, and entered a

judgment which entered in substance that the Court of Appeals, the Court of Appeals

judgment, was entered on a bill and was the last of a bill of exchange

which was entered in the City of New York, and was entered in the Court of Appeals

and from which upon the said bill was entered in the Court of Appeals.

Accordingly, as provided by section 14 of the Court of Appeals Act.

We are not assisted or aided in our consideration of the question by briefs on behalf of the plaintiff.

It has been repeatedly held that failure to serve a proper demand in garnishment proceedings before the institution of those proceedings is a mandatory requirement of the act. This demand should be in writing and should be made both upon the employee and the employer. The trial court apparently was of the opinion that the garnishee waived its rights by answering, but this does not relieve the plaintiff of the obligation of notifying the judgment debtor. The act provides that any judgment rendered without such demand being served upon the employee and so proven as aforesaid, shall be void. Service of notice and demand was jurisdictional and, when called to the attention of the court, a judgment entered contrary to the provisions of the act should be set aside.

For the reasons stated in this opinion the order of the Municipal Court overruling the motion of the garnishee to vacate the judgment is reversed and the cause is remanded with directions to proceed in accordance with the views expressed in this opinion.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

HALL, P.J. AND REBEL, J. CONCUR.

It was not intended to show in any way

the position of the Government.

It has been repeatedly stated that

the Government is not in a position to

make any statement at the present time.

It is stated that the Government is

not in a position to make any statement

at the present time.

It is stated that the Government is

not in a position to make any statement

at the present time.

It is stated that the Government is

not in a position to make any statement

at the present time.

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at the present time.

It is stated that the Government is

not in a position to make any statement
at the present time.

It is stated that the Government is

36826

GEORGE L. NIEDERST,

Defendant in Error,

v.

THOMAS D. CROWLEY, doing business
as THOMAS D. CROWLEY & COMPANY,

Plaintiff in Error.

137
ERROR TO

MUNICIPAL COURT

OF CHICAGO.

273 111 331⁴
Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought his action in the Municipal Court to recover salary due him and secured a judgment against the defendant for the sum of \$1,800.00 and costs.

The only question for our consideration is one of fact. From the undisputed evidence it appears that the plaintiff and defendant entered into an agreement under which the defendant was to employ the plaintiff for five years from March 31, 1931, at a salary of \$4,000.00 per year, plus commission. This contract was not in writing. Plaintiff, however, entered upon his employment and received \$333.33 per month until the first of October, 1931, when his salary was reduced by agreement to \$300 per month. Starting November 1, 1931, he received the sum of \$75.00 a month up to and until July 31, 1932.

This action is brought to recover the difference in the amount of the salary paid and that claimed from the first of November 1931 until July 31, 1932.

Plaintiff testified that in the month of November the defendant gave him \$75.00 with the assertion "that I would get the balance when he could take care of it." Plaintiff testified that defendant made a similar statement in February, 1932, and that the first time the defendant indicated that he did not expect to pay any back salary was about the first of June, 1932. Plaintiff then agreed to take the month of June as a vacation period to help out. July 31, 1932 defendant gave the plaintiff a check for \$75.00, which contained

JOHN L. KILPATRICK

Defendant in Error

v.

THOMAS G. KELLEY, doing business as THOMAS G. KELLEY & COMPANY

Plaintiff in Error

Opinion filed Feb. 7, 1934

THE JUSTICE COURT, in its opinion of the 20th of January, 1934, brought his action in the Municipal Court to recover salary due him and secured a judgment against the defendant for the sum of \$1,800.00 and costs. The only question for our consideration is one of fact.

From the undisputed evidence it appears that the plaintiff and defendant entered into an agreement under which the defendant was to employ the plaintiff for five years from April 1, 1931, at a salary of \$6,000.00 per year, plus commission. This contract was set in writing. Plaintiff, however, entered upon his employment and received \$33.33 per month until the first of October, 1931, when his salary was reduced by agreement to \$200 per month. Starting November 1, 1931, he received the sum of \$75.00 a month up to and until July 31, 1932.

This action is brought to recover the difference in the amount of the salary paid and that allowed from the first of November 1931 until July 31, 1932.

Plaintiff testified that in the month of November the defendant gave him \$75.00 with the suggestion "that I would get the balance when he could take care of it." Plaintiff testified that defendant made a similar statement in February, 1932, and that the first time the defendant indicated that he did not expect to pay any more salary was about the first of June, 1932. Plaintiff then agreed to take the month of June as a vacation period to help out. July 31, 1932 defendant gave the plaintiff a check for \$75.00, which contained

the notation "in final payment of services rendered up to and including July 31, 1932." This check was refused by the plaintiff.

Defendant testified that he told the plaintiff that he could not carry him any longer and asked him how much his rent was and the plaintiff said it was \$75.00 a month and that the defendant then said, "I will pay your rent as long as I can." Defendant testified to three or four conversations with the plaintiff, the next to the last on or about June 1, 1932, in which he told plaintiff, he, defendant, would have to quit as he could not carry him any longer. Defendant's sister who was employed in the office stated that she had heard these conversations in October and November.

One Walker, who had an office with the defendant, testified as to the conversation with reference to the 10% reduction in salary and also another conversation along about the last of October or the first of November in which the defendant told the plaintiff that he could not carry him, the plaintiff, any further. Plaintiff denied these conversations and is in part corroborated as to his original testimony by the fact that the defendant in his, defendant's testimony, stated to the plaintiff that he would pay him his back salary if they got in future business. There is some testimony that a small order or two was subsequently received by the company.

The fact that the check of July 31, 1932 was marked "in final payment of services rendered up to and including July 31, 1932", is also significant in that it appears to have been an attempt by the defendant to get an acknowledgment in full for salary paid. This check, as already stated, was returned.

The cause was tried by the court without a jury and, under such circumstances, this court on appeal will not reverse unless the finding of the trial court is manifestly against the weight of the evidence. The trial court had an opportunity of seeing and observing the witnesses and was in a much better position to pass upon the facts

the notation in final payment of services rendered on to and including July 31, 1935. This check was returned by the plaintiff.

Defendant testified that he told the plaintiff that he could not carry him any longer and asked him how much his rent was and the plaintiff said it was \$75.00 a month and that the defendant then said, "I will pay your rent as long as I can." Defendant testified to have on four conversations with the plaintiff, the last on or about June 1, 1935, in which he said plaintiff, he, defendant, would have to quit as he could not carry him any longer. Defendant's sister who was employed in the office stated that she had heard these conversations in October and November.

One Barker, who had an office with the defendant, testified as to his conversation with reference to the last notation in which he also stated conversation about the last of November or the first of December in which the defendant told the plaintiff that he could not carry him, the plaintiff, any longer. Plaintiff denied these conversations and it is not proven that he to him original testimony by the fact that the notation in his, defendant's testimony, stated to the plaintiff that he would pay him his rent every 15 days not in future business. There is some testimony that a small order or two was subsequently received by the company.

The fact that the check of July 31, 1935 was marked "final payment of services rendered on to and including July 31, 1935," is also significant in that it appears to have been an attempt by the defendant to get an acknowledgment in fact for money paid. This check, as already stated, was returned.

The case was tried by the court without a jury and under such circumstances, this court on appeal will not reverse unless the finding of the trial court is manifestly against the weight of the evidence. The trial court had an opportunity of seeing and observing the witnesses and was in a much better position to hear them than

than this court on review. The testimony on behalf of the plaintiff, standing alone, was sufficient to sustain the finding. We will not disturb the judgment of the Municipal Court entered upon that finding and for that reason and the reasons stated in this opinion, the judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEDEL, J. CONCUR.

then this court on review, the testimony on behalf of the plaintiff standing alone, was sufficient to sustain the finding. We will not disturb the judgment of the trial court unless it is clearly shown that for that reason and the reasons stated in this opinion, the judgment of the trial court is wrong as a matter of law.

ALL, S. J. AND JUDGE, S. J.

38662

CLARA A. CHOZIER,

v.

Complainant,

FREEMAN COAL MINING COMPANY, et al,

Defendants.

JAMES W. McELVAIN, et al,

(Cross Complainants,)

Appellees,

v.

FREEMAN COAL MINING COMPANY, et al,

Cross Defendants.

On appeal of

MACLAY HOYNE,

Appellant.

APPEAL FROM

INTERLOCUTORY ORDERS

IN THE

SUPERIOR COURT

OF COOK COUNTY

GRANTING

INJUNCTIONS.

273 I.A. 632'

Opinion Filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from two interlocutory injunctive orders entered by the chancellor of the Superior court, the first on January 12, 1933 and the second on January 13, 1933. The first injunctive order was upon a bill in the nature of a bill of interpleader filed by the United States Steel Corporation. The second injunctive order was based upon a supplemental bill filed by the McElvains. The supplemental bill of the McElvains claimed an interest in a certain fund in the hands of the United States Steel Corporation. Hoyne also claimed an interest in this fund. The United States Steel Corporation admits holding a fund and charged that persons unknown to it, but known to the defendant Hoyne, also claimed an assignment from Hoyne to a portion of said fund and that there are others also claiming an interest and asks that they be brought into court and that the Court adjudicate the rights of the parties. The original action was started in the Superior Court of Cook County and a decree entered, from which an appeal was taken to the Supreme Court of this state and the decree reversed and the cause remanded.

It appears that a judgment had been obtained by the Burton Coal Company against the United States and this had been assigned to the United States Steel Corporation in order to indemnify it against any liability which it might have incurred in procuring the execution by a surety company of the appeal bond in the original suit. A part of the proceeds of that judgment is still in the hands of the Steel Corporation and this is the fund which is claimed by the various parties in whole or in part.

Subsequently, and after the injunctive orders already referred to, Hoyne made a motion to dissolve these injunctions, which was denied, and an appeal was prayed and perfected from the orders of the chancellor denying his motion to dissolve. This is heard on appeal as cause No. 36862 and has been consolidated for hearing with the appeal in this cause No. 36859.

It appears that there were two suits pending involving this fund in which Hoyne and the McElvains were parties in the Supreme Court of the State of New York and in the United States District Court in New Jersey. The injunctive orders restrained Hoyne from proceeding with these actions until the further order of the court. The cross-bill of the United States Steel Corporation was filed December 14, 1932. On December 20, 1932 Hoyne moved to strike this cross-bill and the motion to strike was denied and a demurrer thereto was overruled January 12, 1933. Hoyne, thereupon filed his answer to this bill. The second supplemental bill of the McElvains was filed August 7, 1930, to which Hoyne filed an answer on December 18, of that same year. Hoyne insisted that the original bill was filed December 23, 1932, by Clara A. Crozier against the Freeman Coal Mining Company, Burton Coal Company, Fred A. Burton, the McElvains and others, and that Hoyne was not a party to that suit; that he was not made a party thereto until the second supplemental bill and cross-bill which was filed August 7, 1930; that the Burton Company had not, when the suit

It is also true that a judgment was rendered by the

Boston Local Company against the United States and the

United States in the United States Supreme Court in January

its rights any liability which it might have incurred in

the execution by a duly constituted authority of the

will. A part of the proceeds of that judgment is still in the hands

of the local corporation and this is the fund which is claimed by

the various parties in whole or in part.

Subsequently, and after the judgment had been

rendered, the local corporation was dissolved and the

will was annulled, and an appeal was taken from the order of

the Chancellor denying his motion to dissolve

appeal to the Supreme Court and has been dismissed with

the appeal in this cause No. 2332.

It appears that there were two suits involving

this fund in which both the local corporation and the

United States of New York and in the United States District Court

in New York. The information relative to these suits was

obtained from the records of the United States District Court

at New York. The first suit was filed in the District Court

on December 14, 1900, and the second suit was filed in the

same court on January 1, 1901. The first suit was filed

by the local corporation against the United States and the

United States against the local corporation. The first suit

was dismissed on January 19, 1901, and the second suit

was dismissed on January 19, 1901. The first suit was

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dismissed on January 19, 1901. The first suit was

dismissed on January 19, 1901. The first suit was

was started, recovered any judgment against the United States Government and did not do so until February 28, 1935; that the decree entered in the original action April 3, 1935, holding that part of the judgment of the Burton Company against the Government belonged to the Freeman Coal Company was erroneous as held by the Supreme Court of this state; that the judgment against the Government was never part of the property involved in the original bill and that its assignment to Hoyne was made subsequently and before the Steel Corporation and Hoyne were made parties to the second supplemental bill; that the allegations under which the Steel Corporation and Hoyne were made parties in the original proceeding were not germane and that the title had come to Hoyne as an innocent holder before there was any decree; that he had entered his appearance in the suit pending in New York but that he had been compelled to do so because of the insistence of the Steel Corporation that he appear and avail himself of his rights under that proceeding.

In order to understandingly pass upon the claim of Hoyne that the temporary injunction should be dissolved, it would be necessary to examine the original proceedings, the bill in the nature of a bill of interpleader by the United States Steel Corporation, the second supplemental bill of the McKelvains, to which answers have been filed and under which proceedings are now in progress, and in fact adjudicate the merits of the proceedings so far as Hoyne is concerned.

It may be that the fund in the hands of the United States Steel Corporation is the only asset out of which the parties could seek redress. This fund amounts to considerably over \$200,000.00 and the interests of a number of persons are involved. Under the old common law the chancellor had the right to enter a temporary restraining order which was not subject to review. The right to an appeal from such an order has been granted by statute in this state, but the time for an appeal has been limited and, under the rules of

court, briefs have to be filed within a short time and decisions promptly made. It was not intended, however, by this statute to create a short cut to obtain a hearing on the issues before the chancellor had an opportunity to do so.

Before a temporary injunction is entered the statute provides that notice shall be given and that there shall be sufficient allegations of fact showing the existence of an emergency which would render the injunction necessary without notice. Also provision is made for an appeal upon giving bond for costs, which may be approved by the clerk. On an interlocutory appeal it is the duty of this court to see that those requirements are fulfilled. Where, however, the parties are in court and it appears to the presiding chancellor that it is necessary to hold the matter in statu quo, he is vested with a discretion and this ^{court} will respect that discretion except in so far as it is unreasonable.

We are asked to pass upon the merits of this proceeding and this, under the rule laid down by this court, we will not do. It would only serve to defeat the purpose of a final and binding decree from which an appeal would lie to this court and thence on to the Supreme Court for final decision. McDougall Co. v. Woods, 247 Ill. App. 170; Friedman v. Peckler, 355 Ill. App. 199; Lincoln Trust & Sav. Bank v. Nelson, 261 Ill. App. 370.

For the reasons stated in this opinion the order of the Superior Court is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

...the fact that the ...

Relative to the number of employees in the company, the number of employees in the company is relatively small.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific information required.

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4. The Commission is authorized to carry out the following functions:

Received 12 May 1993; accepted 12 July 1993

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Page 1 of 1

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36892

ELINORE FITZSIMMONS,

(Plaintiff) Appellee,

v.

ALMORE DYE HOUSE, a corporation,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

273 I.A. 632²
OF CHICAGO.

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff brought her action in tort in the Municipal Court of Chicago and obtained a judgment for personal injuries in the amount of \$625.00. The case was tried before a jury.

From the evidence it appears that on July 6, 1931, plaintiff was driving her Essex automobile in a westerly direction on Albion street, which street runs east and west. She testified that as she approached the intersection with Clark street she looked both ways to be sure there was no one coming; that there was another car on her left traveling close to her and that she proceeded to cross Clark street; that she did not see the truck which was traveling in a southerly direction on Clark Street until it was about 3 feet from her and that it hit the right side and front of her car and passed on and turned over.

A witness Vail, testifying on behalf of plaintiff, stated that in his opinion the truck was traveling close to 30 miles an hour and slowed down before coming in contact with the plaintiff's car; that the driver of the truck turned to the right, evidently to avoid a collision; that when he first saw plaintiff she was crossing Clark street just about to the street car tracks, almost to the middle of the road.

Defendant's driver testified that his truck was a small one ton Chevrolet delivery truck and that when he saw plaintiff's car it was traveling at about 25 or 30 miles an hour.

A repair man, testifying for the defendant, stated that when he came to take the truck away he found that it had been struck straight on.

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Opinion filed Feb. 7, 1934

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DEPARTMENT OF VETERANS AFFAIRS - OFFICE OF THE ASSISTANT SECRETARY FOR VETERANS BENEFITS - 1119

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Page 10 of 10

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1. *There is a significant positive relationship between the number of years of experience and the salary of a teacher.*

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It is insisted that the verdict should be set aside on the ground that the defendant had the right of way under the statute. The Motor Vehicle act so provides, but it is still a question of fact where there is a collision at intersecting streets. If a person approaching a street intersection apparently has ample time in which to cross, he is not guilty of negligence as a matter of law in attempting so to do, even though the statute does contain the provision referred to.

It is claimed that the court erroneously instructed the jury as to the respective rights of the litigants at the time of the accident in question. Only a part of the instruction, however, has been preserved and only that part appears in the abstract most favorable to the defendant. In view of the fact that the entire instruction is not before us we are precluded from considering it piecemeal.

The issues of fact having been settled by a trial court and a jury, we are precluded from reversing a judgment unless we can say it is manifestly against the weight of the evidence which, in this case, we are not prepared to do.

For the reasons stated in this opinion, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND NEBEL, J. CONCUR.

17. It is further stated that the Government has not taken any steps to prevent the spread of the disease and that the Government has not taken any steps to prevent the spread of the disease.

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The jury is in the responsive position to the evidence of the fact of the accident in question. Only a fact in the responsive position has been preserved and only that fact is to be preserved in the responsive position to the fact of the accident. In view of the fact that the responsive position is not before us in the responsive position to the fact of the accident.

1. The Bureau of the Census has been advised by a reliable source that the following information is being furnished to the Bureau of the Census by the Bureau of the Census:

THE UNIVERSITY OF CHICAGO PRESS
CHICAGO, ILLINOIS 60637

1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 26

36743

CHARLES E. NALLENS,
(Plaintiff) Appellee,

v.

YELLOW CAB COMPANY, a Corporation,
(Defendant) Appellant.

140 7
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

273 I.A. 632³

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal Court against the Yellow Cab Company for damages to his automobile, by reason of the alleged negligent operation of one of the defendant's cabs. There was a trial with a jury, resulting in a verdict for plaintiff in the sum of \$483.32 and judgment was entered on the verdict, from which judgment this appeal has been perfected.

From the facts it appears that on April 9, 1931, at approximately 3:00 o'clock in the morning, the plaintiff with a Mr. Schragger drove his automobile west on Delaware place and parked it facing west on the south curb in front of the Whitehall Hotel. Delaware place runs east and west. The lights were turned off and the plaintiff and Shragger entered the hotel and went to the apartment of Shragger where they prepared to retire for the night. About 10 or 15 minutes after they had left the car Shragger heard a crash and looked out of the window and saw a Yellow Cab proceeding east on Delaware place and he shouted and the Yellow Cab came to a stop near the corner of the next street east and from there a police officer accompanied the driver of the Yellow Cab back to the hotel.

It appears from the evidence that the Yellow Cab had run into the car of the plaintiff, as a result of which the damages were sustained.

According to the testimony of the driver of the Yellow Cab he was traveling at the rate of from 30 to 35 miles an hour east

44

285

[illegible]

... ..

• 744 • (31274-46)

Opinion filed Feb. 7, 1934

* 1990年12月20日在《中国日报》发表，原载于《中国日报》。

There is a lot of work to do in the next few years.

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

* "Judge" was the only 1940s-era slang term I could find for "judge."

THE UNIVERSITY OF CHICAGO PRESS

[Faint handwritten notes at the bottom of the page]

...and I have not thought of this much, I have

THE UNIVERSITY OF CHICAGO

John Edgar Hoover, Director of FBI's Civil Liberties

[illegible]

...the first of May ...

1. The first group of people who were interviewed were the...

[illegible]

It is important to note that the above information is for informational purposes only and should not be used for any other purpose.

07 15 minutes - clear they had left the car unattended and were

and located west of the Lincoln and Washington

on various dates and is quoted, and the value has been a step

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

11-11-61

IT REQUESTS THAT YOU RE-EXAMINE THE FOLLOWING:

THE UNIVERSITY OF CHICAGO LIBRARY

• *How do you feel about this?*

According to the testimony of the latter

One of the members of the staff of the FBI who is in New York

on Delaware place and when he was about in front of the Whitehall Hotel a car came out of the alley or Hugelot place, which is east of the hotel, and turned west. The bright lights of that car blinded him and to avoid a head-on collision he turned to the right and ran into the automobile of the plaintiff which was parked at or near the front of the hotel.

Defendant insisted that the plaintiff failed to establish any negligence on the part of the defendant and that plaintiff was guilty of contributory negligence on his own part. The question as to the evidence and its weight is not before us inasmuch as the bill of exceptions shows no motion for a new trial on the part of the defendant. Foreman-State Trust and Savings Bank v. Demeter, 347 Ill. 72.

It is insisted that the court erred in refusing to direct a verdict for the defendant, but the bill of exceptions fails to show a motion for a directed verdict at the end of all the evidence. Wolf Co. v. Refrigerating Co., 252 Ill. 491.

The remarks of the court during the proceedings, objected to by defendant, are not sufficient to require a reversal of the judgment and, moreover, were brought about because of the act of defendant's counsel in seeking to obtain a ruling during the course of the trial. Neither is ^{point} ~~the~~ preserved for our consideration because of the failure to file a motion for a new trial and preserving the motion by a bill of exceptions. Hardy v. Doblar, 248 Ill. App. 361.

Defendant offered a number of instructions, most of which were given, but the court refused to give at the request of the defendant certain instructions based on the Motor Vehicle Act and on certain ordinances of the City of Chicago. The section of the Motor Vehicle Act in question provides that during the night time a motor vehicle standing on any road, highway or street, shall display a light on the front and rear.

Mallers, the driver of the taxicab, testified that he

an witness given and when he was shown in front of the witness
stand a car came out of the alley or passage way, which is east
of the hotel, and passed west. The witness spoke of him as standing
him and to avoid a head-on collision he turned to the right and ran
into the rear of the vehicle which was parked at the door
the front of the hotel.

witnesses testified that the witness failed to establish
any negligence on the part of the defendant and that the witness
admitted of contributory negligence on his part. The question as
to the witness and his failure to establish his negligence on the part
of the witness arose on motion for a new trial on the part of the
defendant. People v. People, 100 Ill. 411.

It is insisted that the court was in error in refusing to
grant a new trial for the defendant, but the bill of exceptions will be
taken a motion for a new trial granted at the end of all the evidence.
People v. People, 100 Ill. 411.

The question of the court during the proceedings, whether
to be defendant, and not defendant to receive a verdict of the
jury and, moreover, that the jury should be instructed at the end of
the evidence to receive a verdict of the jury during the proceedings
of the trial. People v. People, 100 Ill. 411. ^{point}
of the trial. People v. People, 100 Ill. 411. ^{point}
of the trial. People v. People, 100 Ill. 411. ^{point}
of the trial. People v. People, 100 Ill. 411. ^{point}

defendant claimed a number of witnesses, most of
which were given, but the court refused to give to the defendant at
the defendant's expense instructions based on the facts which the
and on certain evidence of the bill of exceptions. The motion for
the later vehicle was in evidence provided that during the night
time a motor vehicle standing on the road, highway or street, shall
display a light on the front and rear.
defendant, the driver of the vehicle, testified that he

was familiar with the Whitehall Hotel and its surroundings and that on the night in question there were cars parked along both sides of Delaware place, and he knew that if he turned off too far he would run into one of them; that he had no trouble in seeing these cars; that he swung out of the straight line of these cars because he was blinded by the lights on the car which had turned out of the alley. It is apparent from his testimony that the failure of the plaintiff to have a light on his car in no way contributed to the accident as, he, the driver of the Yellow Cab, knew that there were cars parked along this side of the street.

Section 3018 of the city ordinances provides that parked cars should not be parked with the left side of the vehicle next to the curb. The failure to observe this part of the ordinance on the part of the plaintiff did not contribute to the accident, even though it were parked facing in the wrong direction and this could not excuse the negligence of the defendant as it did not contribute to the accident.

Section 3045 providing for the display of lights on parked cars was not applicable as its violation did not contribute to the accident for the reasons already stated.

Section 3016 provides it shall be unlawful to park a vehicle on any street in the City of Chicago for a period of time longer than one hour between the hours of 2 A. M. and 6 A. M. of any day. Plaintiff did not violate this ordinance because his car had been parked only 10 or 15 minutes before the accident occurred.

In the case of Pienta v. Chicago City Ry. Co., 284 Ill. 246, it was held that failure to ring a bell by a train or street car can not be held to be the proximate cause of an injury resulting from a collision if the person injured already knew of its approach.

In Sale v. Chicago Junction Ry. Co., 259 Ill. 476, it was held that failure by a flagman to give warning of the approach

was called also the Mitchell Hotel and the correspondence was sent
on the night in question. There were many persons who were
believed to be present, and it was found that it was not the first
time into one of these; that he had no trouble in getting inside;
that he went out of the street light at some time between 10 and
11 o'clock, and he was seen by the witness who was on duty.
It is suggested from the testimony that the witness of the witness
to have a light on his car in no way contributed to the witness's
view, the driver of the Yellow Cab, that he had been seen to
along this side of the street.

Section 1015 of the City Ordinance provides that persons
shall not be present with the light of the vehicle on the
city. The witness to the fact that he was on duty at the
time of the accident did not contribute to the witness's view.
It was noted during the hearing that the witness was not
aware of the position of the defendant as it was not possible to
the accident.

Section 1015 provides that the driver of a vehicle in
which there are not authorized persons is liable for the same.
In the case of the defendant, it was found that the
vehicle was not present in the city of Chicago for a period of time
longer than was allowed by the ordinance. It was found that the
defendant did not violate the ordinance because his car had
been found only in 12 minutes before the accident occurred.

In the case of People v. John J. Smith, 1911, 1912, 1913,
it was held that when a car is used for a purpose other than
that for which it was designed, it is liable for the same.
In the case of People v. John J. Smith, 1911, 1912, 1913, it
was held that when a car is used for a purpose other than

of a train was not material where such person had already received such warning of its approach from another source.

In Munn v. Chicago City Ry. Co. et al., 235 Ill. App.160, the court held that it was not error to refuse to instruct the jury as to the existence of certain ordinances where there was no possible relation of cause and effect between the violation of such ordinances and the accident in question.

In the case at bar the driver of the taxicab knew that plaintiff's car was parked at the place in question, so that it is apparent that the collision was not caused by the violation of any ordinance.

We see no reason for disturbing the judgment and for that reason the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

of a train and the engine of the other train
was running at its normal speed.

In Case v. Michigan City Ry. Co., 111 Ill. 407, 1894,

the court said that it was not error to refuse to instruct the jury
as to the existence of certain conditions where there was no evidence
of their existence and without between the violation of such conditions
and the accident in question.

In the case of the City of Chicago v. the Chicago Ry. Co., 111 Ill. 407, 1894,
the court said that it was not error to refuse to instruct the jury
as to the existence of certain conditions where there was no evidence
of their existence and without between the violation of such conditions
and the accident in question.

We see no reason for disturbing the judgment and for
that reason the judgment of the circuit court is affirmed.
Reversed.

ALL, 111, 407, 1894.

36958

CLARA A. GROZIER,
(Complainant) Appellee,

v.

FREEMAN COAL MINING COMPANY, et al,

Defendants.

JAMES W. McELVAIN, et al,
Cross-Complainants,

v.

FREEMAN COAL MINING COMPANY, et al,

Cross-Defendants,

On Appeal of MCGRAY HOYNE,

Appellant.

APPEAL FROM
INTERLOCUTORY ORDERS
OF THE SUPERIOR
COURT OF COCK
COUNTY,

OVERRULING AND

DENYING

MOTIONS TO

273 I.A. 632
DISMISS
INJUNCTIONS

Opinion filed Feb. 7, 1934

MR. JUSTICE WILSON DELIVERED THE OPINION OF THE COURT.

This is an appeal from two interlocutory orders denying the motions of Hoyne to dissolve two temporary injunctive orders obtained by the United States Steel Corporation and the McElvains January 12, 1933 and January 13, 1933, respectively, restraining Hoyne from proceeding with certain litigation until further order of the court.

This action was consolidated and heard together with case No. 36862 in this court. For the reasons stated in the opinion in that case, the order of the chancellor of the Superior Court denying the motion to dissolve the temporary restraining order, is affirmed.

ORDER AFFIRMED.

HALL, P.J. AND HEBEL, J. CONCUR.

CLASS. & CONTROL

(UNCLASSIFIED) ANALYSIS

7.

REMARKS FOR FIELD OFFICE, ET AL.

CONTINUATION

CLASS. & CONTROL, ET AL.

7.

REMARKS FOR FIELD OFFICE, ET AL.

UNCLASSIFIED

ON REQUEST OF BUREAU, 1984

UNCLASSIFIED

Opinion filed Feb. 7, 1984

MR. JUSTICE WHITE delivered the opinion of the Court.

This is an appeal from the judgment of the District Court

and Justice of Peace in the case of the United States

against the United States of America, et al., and the

United States of America, et al., and the United States

of America, et al., and the United States of America, et al.,

of the Court.

[The opinion was dissented by the Justice of Peace]

and the Justice of Peace in this case. For the reasons stated in the opinion

in that case, the writs of the character of the writs were

for the writs of the character of the writs were

affirmed.

ORDER AFFIRMED.

WILLIAM J. BRYAN, J. CLERK.

27 6 1 11 032

37157

JERRY FIXA et al.,

v.

PAUL H. BURGUND et al.

BENJAMIN KOHOUT, receiver,
Appellee,

v.

JOE PANEK,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

273 I.A. 633

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Joe Panek, a tenant from month to month of a garage of which Benjamin Kohout is the receiver, having been appointed in a foreclosure suit, seeks to reverse an order entered by the Superior court of Cook county awarding the receiver a writ of assistance directing the sheriff of Cook county to eject and remove Panek from the premises because of his default in the payment of rent to the receiver.

The record discloses that the receiver was appointed in a foreclosure proceeding of a brick garage occupied by Joe Panek, as tenant under an oral lease from month to month at a rental of \$50 a month, that Panek owed \$30 for the month of May and the receiver served a five-day notice on him to terminate the lease and brought a suit of forcible detainer before a justice of the peace. Judgment was entered in favor of plaintiff and against defendant in that case, and defendant appealed to the Superior court of Cook county where the appeal is still pending. It further appears that the tenant was in default in the payment

THAT THE

v.

PAUL H. HARRIS, JR.

BENJAMIN HARRIS, Receiver,
Appellee.

v.

JOE HARRIS,
Appellant.

THE COURT OF APPEALS, in its opinion in this case,

By this appeal Joe Harris, a tenant from month to month of a garage of which Benjamin Harris is the receiver, having been appointed in a foreclosure suit, seeks to reverse an order entered by the superior court of Cook county awarding the receiver a writ of assistance directing the sheriff of Cook county to eject and remove Harris from the premises because of his default in the payment of rent to the receiver.

The record discloses that the receiver was appointed in a foreclosure proceeding of a brick garage occupied by Joe Harris, as tenant under an oral lease from month to month at a rental of \$50 a month, that Harris owed \$50 for the month of May and the receiver served a five-day notice on him to terminate the lease and brought a writ of forcible detainer before a justice of the peace. Judgment was entered in favor of plaintiff and against defendant in that case, and defendant appealed to the superior court of Cook county where the appeal is still pending. It further appears that the tenant was in default in the payment

2731A.333

COOK COUNTY.

RECEIVED

APRIL 1908

of the June rent, making a total rent for which he was in default of \$80. It further appeared that the receiver had a responsible tenant who was willing to pay \$75 a month.

The receiver filed his petition and prayed that a writ of assistance be issued to put him in possession of the premises. The defendant tenant filed his answer in which he admits he is in possession under the receiver and agreed to pay \$50 a month. It further appears from the answer that the defendant is in arrears \$80 in the payment of rent. He denies in his answer that he was served with a five-day notice by the receiver, that the lease would be terminated on account of his failure to pay rent. The answer further sets up that the proceedings in forcible detainer were had before the justice of the peace from which it appears that there was a judgment of possession entered in favor of the receiver, and defendant appealed to the Superior court of Cook county by filing his bond in the sum of \$200 and paying the justice of the peace \$16.50 court costs. The answer further sets up that the defendant believed there was a conspiracy between the receiver and one of defendant's competitors to get possession of the premises.

The matter was heard before the chancellor and an order entered in which the facts were found substantially as in the petition of the receiver, and a writ of assistance was awarded.

The defendant tenant contends that he has a right to have the question of his right to retain possession passed upon by a jury; that the receiver, having elected to bring forcible detainer, must wait until that case is disposed of, and that the forcible detainer suit having been brought before the instant proceeding, the chancellor was not warranted in entering the judgment.

We think neither of these contentions can be sustained.

of the land rent, making a total rent for which he was in default of \$50. It further appeared that the receiver had a responsible tenant who was willing to pay \$7 a month.

The receiver filed his petition and prayed that a writ of assistance be issued to put him in possession of the premises. The defendant denied that he was in possession of the premises. It was further alleged from the answer that the defendant is in arrears of \$5 in the payment of rent. He denied in his answer that he was in arrears with a five-day notice by the receiver, that the defendant would be furnished on account of his failure to pay rent. The answer further sets up that the proceedings in this case are void and that there was a judgment of possession entered in favor of the receiver, and defendant appeared to the superior court of Cook County by filing his bond in the sum of \$100 and paying the justice of the peace \$10.00 court costs. The answer further sets up that the defendant believed there was a conspiracy between the receiver and one of defendant's competitors to get possession of the premises.

The matter was heard before the sheriff and an order entered in which the facts were found substantially as in the petition of the receiver, and a writ of assistance was granted. The defendant denied that he was in arrears of \$5 in the payment of rent. He denied in his answer that he was in arrears with a five-day notice by the receiver, that the defendant would be furnished on account of his failure to pay rent. The answer further sets up that the proceedings in this case are void and that there was a judgment of possession entered in favor of the receiver, and defendant appeared to the superior court of Cook County by filing his bond in the sum of \$100 and paying the justice of the peace \$10.00 court costs. The answer further sets up that the defendant believed there was a conspiracy between the receiver and one of defendant's competitors to get possession of the premises.

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The matter was heard before the sheriff and an order entered in which the facts were found substantially as in the petition of the receiver, and a writ of assistance was granted. The defendant denied that he was in arrears of \$5 in the payment of rent. He denied in his answer that he was in arrears with a five-day notice by the receiver, that the defendant would be furnished on account of his failure to pay rent. The answer further sets up that the proceedings in this case are void and that there was a judgment of possession entered in favor of the receiver, and defendant appeared to the superior court of Cook County by filing his bond in the sum of \$100 and paying the justice of the peace \$10.00 court costs. The answer further sets up that the defendant believed there was a conspiracy between the receiver and one of defendant's competitors to get possession of the premises.

The question has been passed upon adversely to defendant's contention in the case of Kessinger v. Whittaker, 82 Ill. 22. In that case there was a foreclosure of a mortgage and a sale of the premises. Kessinger was in possession of the premises. The purchaser at the sale received a master's deed and applied for a writ of assistance which was allowed and a writ issued from which an appeal was taken. It was contended that the order awarding the writ of assistance should be reversed because prior to the time the proceeding was instituted a forcible detainer action was brought before the justice of the peace where a judgment for possession was entered against the defendant and an appeal taken, which was still pending. The court held the fact that the forcible detainer proceeding was pending on appeal did not bar the court in the foreclosure suit from issuing its writ, and said (p. 24): "The remedies are concurrent, either or both of which might be pursued until a satisfaction was had, which would then bar further proceedings. * * * Were a bar or abatement to apply to either proceeding, it would rather be to the suit at law. The court of chancery has had jurisdiction of this whole subject since 1873, and it should not be ousted of its jurisdiction by the mere pending of the forcible entry and detainer suit.

"This proceeding to obtain an order for a writ of assistance is not the institution of a new suit. It is simply another step in the foreclosure suit."

That case is decisive of the questions involved in the proceedings before us, and the order of the Superior court of Cook county is affirmed.

ORDER AFFIRMED.

Matchett, P. J., and McSurely, J., concur.

The question has been posed upon whether it is
question in the case of Wainwright v. Miletich, 22 Ill. 2d. 12.
that case there was a lot of facts of a mortgage and a sale of the
premises. Wainwright was in possession of the premises. The
check of the sale involved a mortgage's deed and applied for a writ
of assistance which was allowed and a writ issued from which an
appeal was taken. It was contended that the writ was issued at the
time of assistance should be reversed because prior to the time
the proceeding was instituted a forcible detainer action was brought
before the justice of the peace where a judgment for possession was
entered against the defendant and an appeal taken, which was still
pending. The court held the fact that the forcible detainer pro-
ceeding was pending on appeal did not bar the writ in the lower
court and that from issuing the writ and said (p. 24): "The writs
are concerned, either on both of which it is to be presumed that a
writ of assistance was issued, which would then bar further proceedings."
There is a bar or abatement so early as either writ issued, it would
rather be so the writ is lost. The writ of assistance has been
issued of this case subject since 1871, and it should not be issued
at the jurisdiction by the mere showing of the forcible entry and
detainer writ.
"This proceeding to obtain an order for a writ of assistance
is not the institution of a new writ. It is simply another way in
the forcible writ."
That case is decisive of the questions involved in the pro-
ceedings before us, and the order of the superior court of Cook
County is affirmed.

JOHN A. WAINWRIGHT,
Respondent.

WAINWRIGHT, J., and WAINWRIGHT, J., concur.

84 7
AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 633²

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D., 1933.

FRED GRIFFEL, et al.,
(Complainants) Appellees,
vs.
LAURITS M. LARSON, et al.,
(Defendants) Appellants.

Appeal from the
Circuit Court of
Lake County.

WOLFE -- P. J.

The complainants, Fred Griffel, et al., on November 4th, 1932, filed in the Circuit Court of Lake County, their verified bill to foreclose deed of trust. On December 13, 1932, the complainants filed in said cause a petition alleging that they had heretofore filed their bill of complaint; that the defendants had been personally served with summons in said suit; that the complainants had paid \$609.00 for taxes and assessments on the premises described in the bill; that said premises were rented and that the rent therefrom was being collected and used by the owner of the equity in the premises; that the premises are scant security for the amount due the petitioners. A copy of the trust deed was attached to the bill of complaint, which provided that the bond of complainants on the application for a receiver, was waived therein. The petition prayed for the appointment of some suitable person, as reciever, to take possession of property and to collect the income from the same, and pay out the amount collected, as the court may direct.

On the same day the court entered an order finding the said petition had been examined and that default had occurred in the payment

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DIVISION
February Term, A. D., 1935.

WARD, WILLIAM, et al.,
(Appellants) Appellees,
vs.
LAURITS, W. LARSON, et al.,
(Defendants) Appellants.

Appeal from the
Circuit Court of
Lake County.

WILLIAM -- P. 3.

The complainants, Ward, William, et al., by counsel, filed in the Circuit Court of Lake County, Illinois, a petition for foreclosure of trust. On December 18, 1934, the complainants filed in said court a petition alleging that the defendant had wrongfully served with summons of complaint; that the defendant had been wrongfully served with summons in said suit; that the complainants had paid \$25.00 for taxes and assessments on the premises described in the bill; that said premises were rented and that the rent thereon was being collected and used by the owner of the equity in the premises; that the defendant was guilty for the amount due the complainants. A copy of the petition was attached to the bill of complaint, which provided that the bill of complaint on the application of a receiver, was returned thereto. The petition prayed for the appointment of a receiver, and return of the same, to take possession of property and to collect the same from the same, and pay out the amount collected, as the court may direct.

On the same day the court entered an order appointing the said petition had been examined and that default had occurred in the payment

of the taxes for the year, 1931; that the deed of trust waived the rights of possession of any income derived from said premises pending foreclosure proceedings; that the grantors in said deed agreed that upon the filing of any bill to foreclose a trust deed that a receiver should at once and without notice be appointed; that a bond of the Complainant on application for receiver was expressly waived; that the premises were rented, and were scant security for the amount due the complainants, and that the rental value of the same did not exceed \$425.00 per year.

The court appointed Charles Klein as receiver. His bond of \$1,000.00 with security was to be approved by the court. To the entering of this order appointing such receiver the defendants duly excepted and perfected an appeal to this court.

On February 9, 1933, a decree of foreclosure and sale was entered by the court. A sale of the mortgaged premises was had on March 13, 1933, at a price of \$304.09 less than the amount of the note, interest and costs. The Master's report of sale was approved and subsequently a money judgment was entered against Laurits M. Larsen and Helga M. Larsen for said sum. An additional record and abstract has been filed by appellee showing that after the order appointing a receiver had been signed, the complainants filed a bond which was approved by the court.

The questions presented to this court is whether the bill of complaint was properly verified, and whether the petition for the appointment of a receiver contained sufficient allegations of fact to warrant the Master in Chancery in appointing a receiver. The question also arises whether the appointment was made in accordance with Paragraph 55, Chapter 22, of our Chancery Act, which provides that before a receiver shall be appointed, the party making the application therefor shall give a bond, etc.

The affidavit attached to the bill of complainant is as follows:

of the times for the year, 1935; that the bond of \$100,000.00 was
rights of possession of any income derived from the property during
proceedings; that the grantors in said deed intended that
upon the filing of any bill to foreclose a trust deed and a receiver
should be appointed and without notice be appointed; that a bill of the
complaint on application for receiver was expressly waived; that the
proceedings were pending, and were being conducted for the benefit of the
complaints, and that the rental value of the property was estimated
\$425.00 per year.

The court appointed Gustav E. Kohn as receiver. His bond of

\$100,000.00 with security was to be approved by the court. In the execution
of this order appointing such receiver the defendant was instructed and
permitted as follows to this court.

On February 7, 1935, a decree of foreclosure was entered
by the court. A sale of the mortgaged premises was held on March 12, 1935,
at a price of \$304.08 less than the amount of the note, interest and
costs. The master's report of sale was approved and entered
in the court records. Judgment was entered against Gustav E. Kohn and Helen E. Kohn
for said sum. An additional record of the fact of how said bill of complaint
showing that after the order appointing a receiver had been entered, the
complaints filed a bond which was approved by the court.

The questions presented to this court in further bill of com-
plaint was orally verified, and whether the addition for the complaint
of a receiver constituted a violation of the provisions of that no warrant the
master in bankruptcy is authorized to receive. The question also arises
whether the appointment was made in accordance with the provisions of
Chapter 22, of our Statutes, which provides that where a receiver
shall be appointed, the party making the application shall give
bond, etc.

The affidavit attached to the bill of complaint is as follows:

"State of Illinois)
County of Lake.) ss.

Fred Griffel, being first duly sworn on oath deposes and says that he is one of the complainants in the foregoing bill of complainant; that he has read the same; that all the material allegations therein contained are true and correct. Further the affiant sayeth not"

"Fred Griffel."

It will be observed that the only thing that this affiant swears to is 'that the material allegations in the bill are true and correct.' Our Supreme Court in the case of Farrell vs. Heiberg, 262 Ill., 407, in passing upon the validity of an affidavit to a bill in chancery, use the following language; "The general rule applicable to the verification of a bill in equity is that the affidavit should be in such form as to subject the party making it to a prosecution for perjury in case the matter sworn to proves to be false." This general rule has been followed in our Supreme and Appellate courts. It is difficult to conceive how perjury could be assigned on such an affidavit as this. It is our opinion that the same is not a sufficient verification of the bill.

Omitting the formal part of the petition for the appointment of a receiver the petition is as follows: "Your petitioners would further represent that they have paid the sum of \$609.00 for taxes and assessments on the premises described in the bill of complaint; that said premises are rented and that the rent on said premises is being collected by the owner of the equity; that said premises are scant security for the amount due your orators on the trust deed and notes sought to be foreclosed therein; that a receiver should be appointed herein by order of this court to collect the rents, issues and profits of the real estate therein referred to, and described in the bill of complaint; that the trust deed herein provides that the bond on application for receiver is expressly waived, etc.", and concludes with a petition for the appointment of a receiver.

State of Illinois
County of Lake.
ss.

That I, Fred Griffo, being first duly sworn, depose and say:

and that that he is one of the complainants in the above entitled bill of complaint; that he has read the same; that all the material allegations therein contained are true and correct. Further, the affiant says in oath:

"That Griffo."

It will be observed that the only thing that was sworn to was that the material allegations in the bill are true and correct. Our Supreme Court in the case of Griffo vs. Griffo, 188 Ill., 407, in passing upon the validity of an affidavit in a bill in chancery, gave the following language: "The general rule applicable in the verification of a bill in equity is that the affidavit should be in such form as to subject the party making it to a cross-examination for perjury in case the matter sworn to proves to be false." This general rule has been followed in our Supreme and Appellate courts. It is difficult to conceive how perjury could be committed on such an affidavit as this. It is our opinion that the case is not a sufficient verification of the bill. Outlining the formal part of the petition for the enforcement of a receiver the petition is as follows: "Your petitioners would further represent that they have paid the sum of \$100.00 for taxes and assessments on the premises described in the bill of complaint; that said premises are rented and that the rent on said premises is being collected by the owner of the equity; that said premises are being leased for the amount of four dollars on the first day and noted amount to be the same; that a receiver would be appointed herein in order of this court to collect the taxes, interest and profits of the real estate thereby referred to, and described in the bill of complaint; that the trust fund herein provided that the said bill be applied for receiver is expressly waived, etc.", and concluded with a petition for the appointment of a receiver.

It will be observed that the only breach of the provision of the deed of trust is the allegation that the petitioners have at some time paid \$609.00 for taxes and assessments on the premises described in the bill of complaint, but it is not stated whether or not the same has ever been repaid to them by the defendant. That said premises are scant security for the amount due the orator on the trust deed and notes sought to be foreclosed, is a mere conclusion of the pleader, and how much is due from the defendants to the complainants is not stated. The records show that there was hearing had upon the bill of complaint which was not properly verified and a petition for a receiver which does not state facts that entitle the complainants to a receiver.--Frank v. Siegel, 263 Ill. App. 316; Strauss v. Georgian Building Corporation 261 Ill. App. 284.

Paragraph 55, Chapter 22 of the Chancery Act provides that, 'before a receiver shall be appointed the party making the application shall give a bond; provided such bond need not be required, when for good cause shown, and upon notice and full hearing, the court is of the opinion that a receiver ought to be appointed without such bond. In passing upon this question the court in the case of Sherman Park State Bank vs. Loop Office Building Corporation, 238 Ill. App. 450, held that the order must show affirmatively that the court was of the opinion that a receiver should be appointed without bond, and it is not enough to recite that the bond is waived upon a good and sufficient showing. The facts must be shown which would excuse the giving of a bond. The specific reason for the appointment of a receiver without bond must be recited in the order. This case was cited and followed in the case of Goodman vs. Heinen, 255 Ill. App. 395.

It is urged by appellee that the error, if any, committed by the trial court in having appointed a receiver without filing a complainant's bond, has been cured because the additional record shows that the Complainant did file a bond which was approved by the court and that

the premises were sold under an order of court for a sum less than the amount of the debt, interest and costs of the foreclosure. The record does not show any order, or leave of court, granted to file such bond, and all of these proceedings were subsequent to the order appointing the receiver. The defendants preserved their exceptions at the time of the appointment of the receiver. This court will consider the appointment from the signing of the order, and these subsequent proceedings did not validate the erroneous appointment of the receiver. It is our opinion that the appointment of the receiver without notice and without a Complainant's bond was erroneous and the order and judgment of the Circuit Court of Lake County should be, and is hereby reversed.

Reversed.

the proceeds were sold under an order of court for more than the amount of the debt, interest and costs of the foreclosure. The record does not show any order, or leave of court, granted in this case, and all of these proceeds were returned to the order appointing the receiver. The defendant presumes their exemption for this of the appointment of the receiver. This court will consider the appointment from the nature of the order, and there is no appointment made as did not validate the erroneous appointment of the receiver. It is our opinion that the appointment of the receiver is not valid and without a complainant's bond was erroneous and the order and judgment of the Circuit Court of Lake County should be, and is hereby reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

7

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

273 I.A. 633³

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On
JAN 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D., 1933.

EMBERT ERICKSON, Admin-
istrator of the Estate of
EARL J. ERICKSON,

Appellant.

vs.

Appeal from
Circuit Court,
Boone County.

FRED BALL,

Appellee.

WOLFE -- P. J.

Embert Erickson as administrator of the estate of Earl J. Erickson deceased, started suit in the circuit court of Boone County against Fred Ball to recover damages for the death of said Earl J. Erickson.

On or about June 27, 1931, a Chevrolet gravel truck driven by Earl J. Erickson, deceased, and a Reo milk truck driven by Fred Ball, collided. The collision took place just north, or on the north edge of a bridge on the Poplar Grove road about one-half mile north of Poplar Grove. The road over said bridge runs north and south. The Erickson truck was being driven in a northerly direction and the Ball truck being driven in a southerly direction. A trial was had and a verdict rendered in favor of the defendant. Judgment was rendered on the same. The case is brought to this court on appeal.

The plaintiff placed eight witnesses on the witness stand. Each gave his version of how the collision occurred, and the relative positions of the trucks after the collision. To rebut this the defendant produced fourteen witnesses who gave their version of how the collision occurred. From a review of the testimony of these various witnesses it

IN THE
SUPREME COURT OF ILLINOIS

SECOND DIVISION
October Term, A. D. 1932.

THOMAS T. BRIDGES, Administrator of the Estate of
EARL J. BRIDGES, Plaintiff.

vs.

THEYD BAIL, Appellee.

Admitted from
Circuit Court,
Hoope County.

WITNESSES --

Robert Johnson as administrator of the estate of Earl J. Bridges deceased, started suit in the circuit court of Hoope County, Illinois, to recover damages for the death of Earl J. Bridges. On or about June 27, 1931, a Chevrolet coupe driven by Earl J. Bridges, deceased, and a Red Bull truck driven by Theyd Bail, collided. The collision took place just north, or on the north side of a bridge on the Poplar Grove road about one-half mile north of Poplar Grove. The road over said bridge runs north and south. The witness truck was being driven in a northerly direction and the said truck being driven in a southerly direction. A trial was had and a verdict rendered in favor of the defendant. Judgment was rendered in the same. The case is brought to this court on appeal.

The plaintiff places eight witnesses on the witness stand. Each gave his version of how the collision occurred, and the relative position of the trucks after the collision. To recapitulate the findings proposed fourteen witnesses who gave their version of how the collision occurred. From a review of the testimony of these various witnesses it

will be observed that their evidence is very conflicting.

It is insisted by the appellant that the court erroneously permitted improper evidence to be introduced on behalf of the defendant. Robert Bullard and Julius Schmeling, who arrived at the scene of the collision about an hour after it happened, were permitted to give their opinion as to the direction the trucks were facing at the time they collided. Before these witnesses were permitted to testify in regard to this matter they had examined the cars and noted the damage to each of them and also made observations at the scene of the collision. It is our opinion that the court did not err in admitting this evidence. The objection stating that the court permitted the defendant's witnesses to give their opinion as to the speed the appellee's truck was being driven, at a point approximately eighty rods distance from the place of the collision as being irrelevant and too remote to have any bearing on the issues involved in the case, is not well taken for the reason that it would go to the weight of the evidence and not to its admissibility.

Where the evidence is conflicting upon material issues of fact in a case, then the instructions to the jury, given on the behalf of all the parties should be accurate and free from all error calculated to mislead the jury. - *Peters vs. Madigan*, 262 Ill. App. 421.; *Chicago & Alton Ry. Co., v. Murray*, 62 Ill. 326.

The defendant's 4th instruction is as follows: "Contributory negligence on the part of Earl Erickson is a bar to recovery in this case whether or not the defendant was negligent, and if you believe from the evidence that Earl Erickson was negligent at the time or immediately before the accident, there can be no recovery in this case." It will be observed that this instruction informs the jury that if the negligence of Earl Erickson in any way contributed to the accident, the plaintiff cannot recover. This is not the law. The negligence of the plaintiff to bar recovery must proximately contribute to the accident. This was decided by this Court in the case of *Miller vs. Burch*, 254 Ill. App. 387,

will be observed that their evidence is very conflicting.

It is insisted by the appellants that the court was not authorized to

lifted improper evidence to the introduction of the same.

Robert D. Smith and John Smith, who arrived at the scene of the

collision about an hour after it happened, were called as witnesses.

Their opinion as to the direction the cars were taking at the time

they collided. Before these witnesses were examined in detail by

the court to this matter they had examined the cars and after the 5 days

to each of them and also made observations at the scene of the collision.

It is our opinion that the court did not err in admitting this evidence.

The objection stating that the court excluded the testimony of the

to give their opinion as to the cause of the collision, there being

driven, at a point approximately eight rods distant from the place of

the collision as being irrelevant and too remote to have any bearing on

the facts involved in the case, is not well taken for the reason that

it tends to the right of the evidence and one to the other.

where the evidence is conflicting as in a civil case of this

in a case, then the instructions to the jury, given on the matter of all

the parties should be accurate and true. It is our opinion that

the jury. - *Smith vs. Smith*, 101 Ill. App. 2d 111; *Smith vs.*

Smith, 101 Ill. App. 2d 111; *Smith vs. Smith*, 101 Ill. App. 2d 111.

The defendant's 4th instruction is as follows: "The defendant

was on the left of the car which was in the way of recovery in this

case whether or not the defendant was negligent, and all the relevant

the evidence that was presented to the jury at the time of the trial.

before the collision, there was no recovery in this case. It will be

observed that this instruction is not in the words of the court in

the case of *Smith vs. Smith*, 101 Ill. App. 2d 111.

cannot recover. This is not the law. The holding of the court in

the case of *Smith vs. Smith*, 101 Ill. App. 2d 111, is the authority.

decided by this court in the case of *Smith vs. Smith*, 101 Ill. App. 2d 111.

(Lerette v. Director General, 306 Ill. 552.) The same vice appears in instruction number 10 given by the court at the request of the defendant. Defendants' given instruction No. 11 does not fit the facts and circumstances in this case as it is not contended on either side that this collision was a mere accident for both sides contend that it was the negligence of the other that caused the damage.

Defendaⁿt's given instruction No. 16 informs the jury that if the injury was the result of an unavoidable accident, then the jury should find in favor of the defendant, Fred Ball. It then defines what is meant by an 'unavoidable accident.' This instruction should not have been given for the reason stated in the discussion of instruction No. 11. Complaint is not made to the giving of defendant's instruction No. 13, but it is our opinion that this instruction should not have been given as the jury should not be permitted to weigh the negligence of the parties to a suit. For the reasons above stated we are of the opinion that the judgment of the circuit court of Boone County should be reversed and remanded.

Judgment reversed and remanded.

the cause

*per letter
4/24*

(Lorette v. Director General, 200 F. 11. 11.) The same view appears in instruction number 10 given at the order of the General of the Department. Defendant's other instruction No. 11 does not fit the facts and circumstances in this case as it is not stated on either side that this collision was a mere accident for both sides contend that it was the negligence of the other that caused the damage.

Defendant's fifth instruction No. 15 infers the jury that if the injury was the result of an unavoidable accident, then the jury should find in favor of the defendant, Fred Hall. It then defines what is meant by an 'unavoidable accident.' This instruction should not have been given for the reason stated in the instruction of instruction No. 11. Complaint is not made in the charge of defendant's instruction No. 15, but it is our opinion that this instruction should not have been given as the jury should not be permitted to weigh the negligence of the parties to a suit. For the reasons above stated we are of the opinion that the judgment of the circuit court of appeals should be reversed and remanded.

The court reversed and remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 633¹

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, A. D. 1933.

GRACE HAYDEN WALKER,
Appellant,
vs.

MARIAN NILES HAYDEN, ROBERT H.
HAYDEN and FIRST GALESBURG
NATIONAL BANK AND TRUST COM²
PANY, as Trustee under the
last will and testament of
Helen C. Niles, deceased.

Appeal from
Circuit Court,
Knox County.

Appellees.

WOLFE -- P. J.

The complainant, now appellant, brought her suit for the construction of the sixth clause of the last will and testament of Helen C. Niles, deceased, the pertinent part of said clause which in so far as this appeal is concerned, provides:

"I hereby give and bequeath to Marian Niles Hayden, of Oak Park, Illinois, the only child of George Niles, a deceased brother of my deceased husband, David P. Niles, the income from the sum of ten Thousand (\$10,000.00) Dollars, during her lifetime and at her death I give and bequeath the said \$10,000.00 to her children, absolutely, share and share alike."

The complainant is a child of Marian Niles Hayden and one of the remainder-men provided for in the sixth clause of said will. The First Galesburg National Bank and Trust Company, as trustee under the last will and testament of Helen C. Niles, deceased, Marion Niles Hayden, and Robert H. Hayden, a child of Marian Niles Hayden, are joined as parties defendant.

IN THE
Circuit Court of Illinois
Southern District
October Term, A. D. 1932.

HELEN C. WILES, Plaintiff,
vs.

Appeal from
Circuit Court,
Cook County.

MARIAN WILES HAYDEN, ROBERT H.
HAYDEN and FIRST CALSBERG
NATIONAL BANK AND TRUST COM-
PANY, as Trustees under the
last will and testament of
Helen C. Wiles, deceased.
Appellees.

NOTE -- P. 1.

The complainant, now appellant, prays her suit for the con-
struction of the sixth clause of the last will and testament of Helen
C. Wiles, deceased, the pertinent part of said clause which in so far
as this appeal is concerned, provides:

"I hereby give and bequeath to Marian Wiles Hayden, of Cook
County, Illinois, the only child of George Wiles, a deceased brother
of my deceased husband, David P. Wiles, the income from the sum of ten
thousand (\$10,000.00) Dollars, during her lifetime and at her death I
give and bequeath the said \$10,000.00 to her children, respectively,
share and share alike."

The complainant is a child of Marian Wiles Hayden and one of
the remainder-men provided for in the sixth clause of said will. The
First Calisberg National Bank and Trust Company, as trustee under the
last will and testament of Helen C. Wiles, deceased, Marian Wiles Hayden,
and Robert H. Hayden, a child of Marian Wiles Hayden, are joined as
parties defendant.

After receiving, for a number of years, the income from the trust estate created under the sixth clause of said will, Marian Niles Hayden, renounced and surrendered all of her interest to such trust estate and filed her written renunciation with the trustee of said will. Subsequently, demands were made by the remainder-men upon the trustee for a distribution to them of said trust estate, which demands have been refused.

The complainant contends that by virtue of the renunciation of all interest in the trust estate by Marian Niles Hayden, the life estate is extinguished, making necessary a construction of the sixth clause of said will, and that in the absence of a clear expressed intention of the testatrix to the contrary, a proper construction of the sixth clause would permit and direct the distribution of the said trust estate to the remainder-men entitled as such, as of the date of said renunciation.

The complainant filed her verified bill of complaint in the Court below on January 9, 1933. Two of the defendants, both beneficiaries under the sixth clause of the said will, joined in answer to the bill of complaint, to which the complainant filed her replication. The other defendant, as trustee under the will, filed its general demurrer to the bill of complaint. The demurrer was argued before the Court but prior to any ruling thereon, complainant filed an amendment to her bill of complaint. By leave of the Court, the demurrer was refiled to the bill of complaint as amended, and the argument theretofore had, was held to apply as the argument on the demurrer to the amended bill of complaint. The Court sustained the demurrer. The complainant elected to stand by her bill of complaint as amended. A decree was entered dismissing the said bill of complaint as amended, for want of equity.

The bill alleges that the complainant is of full legal age and a daughter of Marian Niles Hayden; that Marian Niles Hayden, during her lifetime has had but three children, two of whom are now living, namely, the complainant and one Robert H. Hayden; that the deceased child during his lifetime was unmarried, and departed this life on

After receiving, for a number of years, the income from the trust estate created under the will of said wife, William Lloyd Hayden, renounced and relinquished all of his interest in said trust estate and filed her written renunciation of the trustee of a will. Subsequently, decrees were made by the court in favor of the trustee for a distribution to them of said trust estate, which amounts have been refused.

The complaint contends that by virtue of the renunciation of all interest in the trust estate by William Lloyd Hayden, the life estate is extinguished, making necessary a reconstitution of the said estate of said will, and that in the absence of a clear expressed intention of the testatrix to the contrary, a proper construction of the said will should be made and direct the distribution of the said trust estate to the remaindermen entitled to such, as at the date of said renunciation.

The respondent filed her verified bill of complaint in the court below on January 8, 1938. Two of the defendants, both beneficial under the sixth clause of the said will, joined in answer to the bill of complaint, to which the respondent filed her verification. The other defendant, as trustee under the will, filed his general answer to the bill of complaint. The general answer denied the bill of complaint in every thing therein, complaint filed in answer to her bill of complaint. By leave of the court, the trustee was replied to the bill of complaint as amended, and the argument thereto was held to reply as the answer to the bill of complaint. The complaint is amended by the court without the necessity. A decree was entered sustaining the bill of complaint as amended, for want of equity.

The bill alleges that the said William Lloyd Hayden, and a daughter of William Lloyd Hayden, both named William Lloyd Hayden, and a daughter of said William Lloyd Hayden, two of whom are now living, her lifetime has had but three children, two of whom are now living, namely, the complainant and one Robert E. Hayden; that the deceased child during his lifetime was unmarried, and deceased this life and

October 12, 1918, leaving him surviving no child or children of his, nor any child or children adopted by him; that Marian Niles Hayden has adopted no child or children; that Helen C. Niles departed this life on June 20, 1924, leaving a last will and testament executed by her on June 3, 1924, and admitted to Probate in the County Court of Knox County, Illinois, on September 16, 1924, (a copy of said will is attached to the bill of complaint as Exhibit A.) That First Galesburg National Bank and Trust Company is now the duly qualified and acting trustee under said will. The bill then sets forth part of the sixth clause of said will.

The bill further charges that on November 18, 1932, Marian Niles Hayden renounced and surrendered all her interest under the said will, and gave due notice of such renunciation to the trustee of said will; that the said trustee now holds the trust fund in its possession, and refuses to distribute same to the complainant and Robert H. Hayden, as remainder-men though demands have repeatedly been made upon it to do so; that the life estate created under the sixth clause of said will has been extinguished by the renunciation of Marian Niles Hayden, as life tenant; that the extinguishment of the life estate makes necessary a construction of the sixth clause of said will to determine what distribution shall be made of such trust estate; that upon the said renunciation by the life tenant, the trust estate became due and payable to the complainant and to Robert H. Hayden, equally. Complainant prays for a construction of the sixth clause of said will, for a decree ordering distribution of the trust estate to the complainant and to Robert H. Hayden, in equal shares, and for general relief.

The action of the Court in sustaining the demurrer to the amended bill and dismissing the same for want of equity presents the question to this Court: Does the amended bill of complaint state a cause of action?

It is contended by the appellant that under the sixth clause of said will that Marian Niles Hayden was given a life estate in the \$10,000.00 legacy, and that her renunciation of her interest under the

will, works an extinguishment of the life estate as effectly as her decease, and accelerates the rights of Grace Hayden Walker and Robert H. Hayden as remainder-men, and they are entitled to receive the legacy of \$10,000.00. It is contended by the appellee that the language of the will is clear, explicit and not ambiguous, and does not need the aid of a Court of Chancery to construe the same; and therefore, the Court does not have jurisdiction in such a case. The appellee further contends that all the necessary parties were not made parties defendant to the suit. The appellee denies that the doctrine of acceleration applies to the facts as alleged in the bill of complaint.

It will be noted that the complainants asked for a construction of only a part of the sixth clause of the last will and testament of Helen C. Niles, deceased, and our Courts have repeatedly held that if the language of the will is clear and explicit, a Court of Equity will not take jurisdiction in an attempt to construe the same. The leading case in this state is McCarty vs. McCarty, 275 Ill., 573, in which the Court uses the following language: "There was nothing in the bill calling on the Court to exercise any power for the conservation, preservation, protection or betterment of the estate during any period of contingency pending a contingent remainder or executory devise or otherwise. The bill was filed solely for the purpose of having the Court declare the contingent remainders destroyed and extinguished and the legal title to be in Emma Y. McCarty, one of the complainants, and the remainder of the amendment merely dispensed with the necessity of a trust for the exercise of the jurisdiction. Under the amendment the existence of a trust is not a test of the jurisdiction of courts of equity to construe wills where there is doubt or uncertainty as to the rights and interests of parties arising from ambiguous language in the will, but in this case the terms of the will were not doubtful and their validity is not contested. The construction of the will of Francis A. McCarty was no more involved in the suit than such construction is involved in any case where a will is in the chain of title of the com-

will, works an abandonment of the life estate as effectively as her
deceased, and also vests the rights of the life tenant in her and her
H. Hayden as remainder-man, and may any other title to receive the legacy
of \$10,000.00. It is contended by the appellee that the language of the
will is clear, explicit and not ambiguous, and does not need the aid of
a Court of Chancery to construe the same; and therefore, the Court need
not have jurisdiction in such a case. The appellee further contends
that all the necessary parties were not made parties before the Court in the
suit. The appellee denies that the doctrine of res judicata applies to
the facts as alleged in the bill of complaint.

It will be noted that the complainants seek for a declaration
of only a part of the sixth clause of the last will and testament of
William C. White, deceased, and our Courts have repeatedly held that if
the language of the will is clear and explicit, a Court of Equity will
not take jurisdiction in an attempt to construe the same. The equity
case in this state is *McCarthy vs. McCarthy*, 275 Ill., 407, in which the
Court uses the following language: "There was nothing in the bill
calling on the Court to exercise any power for the modification,
reformation, protection or betterment of the estate during the lifetime
of contingencies pending a contingent remainder or executory devise or
otherwise. The bill was filed solely for the purpose of a declaration that
before the contingent remainder destroyed and extinguished and the
legal title to be in Emma Y. McCarthy, one of the complainants, and the
remainder of the respondent merely disowned with the necessity of a
trust for the exercise of the jurisdiction. Under the respondent the
existence of a trust is not a part of the jurisdiction of equity or
equity to construe wills there is doubt as to the propriety of the
rights and interests of parties arising from ambiguous language in the
will, but in this case the terms of the will were not doubtful and their
validity is not contested. The construction of the will of Francis A.
McCarthy was no more involved in the suit than such construction is in-
volved in any case where a will is in the chain of title of the con-

plainant and where there is no uncertainty or ambiguity as to its meaning. The suit is not by an executor or devisee claiming under the will but was brought by complainants who allege the destruction of contingent remainders created by the will, and there was no difference between the parties respecting the construction of the will. The first point stated in the brief for the guardian ad litem is that the widow was only given a life estate, and the second is that the provisions of the will created contingent remainders with a double aspect. There is no question concerning the construction of the will which is even debatable."

The McCarty case was followed in the case of Warren vs. Warren, in 279 Ill., page 217, and the Court in quoting from what was held in the McCarty case, say: "We held in the case of McCarty vs. McCarty, 275 Ill., 573, that it was error for a court of equity to assume jurisdiction of a bill to construe a will which was neither ambiguous nor uncertain, where there was no equitable estate to be protected or equitable right to be enforced and no necessity for the exercise of any power of the Court for the conservation, preservation, protection or betterment of the estate or the settlement of any real controversy between the parties, but where the bill was filed only for the purpose of obtaining a decree that contingent remainders had been destroyed and that the complainant had a legal title to the premises in fee simple. This is just such a case. There is no part of the will which is doubtful or requires construction." The McCarty case was cited and followed in the cases of Sherman vs. Flack, 283, Ill., 455, and Buckner vs. Carr, 302 Ill., 387.

We are of the opinion that the language of this clause of the will of Helen C. Niles, is clear and not ambiguous, and the trial Court properly held that the complainant was not entitled to have a court of equity construe the same. The Court cannot acquire jurisdiction to construe a will by allegations that a question requiring construction exists, when the bill of complaint itself shows there is no such question. --Greeno vs. Greeno, 284, Ill., 416.

Assuming that the bill of complaint does state a cause of action, a serious question arises as to whether all the necessary parties were made defendants in the suit. In construing a will it is necessary for the Court to examine the whole will and ascertain the testator's intention to properly construe any particular clause of the will. A copy of the will was attached to the bill of complaint, so that we have the whole will before us on this appeal. The will does not mention Grace Hayden Walker nor John Hayden, and the only right that they have under the will is that they are the children of Marian Niles Hayden. Marian Niles Hayden is given the income from the \$10,000.00 fund during her lifetime, and at her death the \$10,000.00 to be paid to her children. The questions now arise whether the children of Marian Niles Hayden take as a class, and if so, would children born later to Marian Niles Hayden take equally with the then living children of Marian Niles Hayden, and must there be living children of Marian Niles Hayden at the time of her death to prevent the legacy lapsing. While we do not decide these questions, the residuary legatee under the will is certainly entitled to be heard in regard to these matters if the Court assumes jurisdiction to construe the will.

It is contended by the appellant that the question of necessary parties was not presented to the trial Court and, therefore, should not be raised in the Appellate Court. The appellees contend that the Court's attention was called to this matter at the time of the hearing. From the record in this case we have no way of knowing what questions were argued before the trial Court, or on what points he decided the bill of complaint was defective. Our Courts have held that if the necessary parties to a bill in chancery are not in Court that that question need not be raised before the trial Court, but it may be taken advantage of in an appellate tribunal. A demurrer to a bill not only challenges the sufficiency of the bill, but if the Court can see from an examination of the bill that all necessary parties are not before the Court that the objection may be made on appeal or a writ of error.

Assuming that the bill of material was a success of

action, a serious question arises as to whether or not the necessary

parties were made defendants in the bill. It is contended that it is

necessary for the bill to include the whole bill and not only the

testator's intention to convey property but also the intention of the

will. A copy of the will was attached to the bill of material, so that

we have the whole will before us on this subject. The bill does not

mention Grace Haydon Walker nor John Haydon, and the only parties that

they have under the bill is that they are the children of William White

Haydon. William White Haydon is cited the income from the \$10,000.00

fund during her lifetime, and at her death the \$10,000.00 to be paid

to her children. The question now arises whether the children of

William White Haydon take as a class, and if so, would children born

later to William White Haydon take equally with the then living children

of William White Haydon, and must share his living children of William White

Haydon at the time of her death to prevent the family property from

being not these parties, the reason is that under the will

is certainly entitled to be heard in regard to these matters if the

court assumes jurisdiction to construe the will.

It is contended by the appellant that the question of necessary

parties was not presented to the trial court and, therefore, should not

be raised in the appeal to court. The appellee contends that the court's

attention was called to this matter at the time of the hearing. From

the record in this case we have a very clear and distinct question was

argued before the trial court, by an expert witness he decided the bill of

complaint was defective. Our courts have held that it was necessary

parties to a bill in chancery and in equity that every question need not

be raised before the trial court, but it may be taken advantage of in

an appellate tribunal. A complaint to a bill may only be amended after

allowance of the bill, but if the court can see from an examination

of the bill that all necessary parties are not before the court that the

objection may be made on appeal or a writ of error.

*per letter
11-1-21
Lynch
Campbell*

In an early case of *Talcott vs. Dudley*, reported in 4-Scammon, at page 424, the Court in considering whether or not all parties had been made defendant to a bill has this to say: "It is to be remarked, that this objection was not made in the Circuit Court, but is now for the first time interposed. It was insisted, on the argument, that it should have been taken at an earlier stage of the proceeding, and that it comes too late in this Court.

The correct practice, where the want of proper parties is apparent on the fact of the bill, is to take advantage of it by demurrer. If the objection does not thus appear, it may be set up by plea, or insisted on in the answer. Where the parties thus omitted are mere formal parties, or not absolutely necessary to a decision of the case, the Court will not listed to the objection at the hearing; but where the rights of parties not before the Court are inseparably connected with the subject matter in dispute, so that a final decision cannot be made without materially affecting their interests, the objection may be taken at the hearing or on appeal or error."

The case of *Gerard vs. Bates*, 124 Ill., 150, is authority for the proposition that when all necessary parties are not before the trial Court, the question can be raised in the Appellate Court. The proper way to raise it is by demurrer when it is apparent on the face of the bill, and same may be raised for the first time in the Appellate Court.

There is a residuary clause in the Niles' will in which lapsed legacies would fall. There is also a forfeiture clause in the will to the effect that if any beneficiary in the will who interferes with the distribution of the estate as fixed by the will, shall take nothing under it. The residuary legatee is not a party before the Court. If the Court had taken jurisdiction and attempted to construe the will, the rights of all the parties under it should be before the Court. All questions between the parties arising out of the will should be determined in this proceeding. Whether the Court holds or does not hold that the children of Marian Niles Hayden take as a class or that there must be living children at the death of Marian Niles Hayden to prevent the

In an early case of *Ex parte*, 124 Ill., 120, is authority for the proposition that when all necessary parties are not before the trial court, the question can be raised in the appellate court. The proper way to raise it is by demurrer when it is apparent on the face of the bill, and same may be raised for the first time in the appellate court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court.

The case of *Ex parte*, 124 Ill., 120, is authority for the proposition that when all necessary parties are not before the trial court, the question can be raised in the appellate court. The proper way to raise it is by demurrer when it is apparent on the face of the bill, and same may be raised for the first time in the appellate court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court.

The case of *Ex parte*, 124 Ill., 120, is authority for the proposition that when all necessary parties are not before the trial court, the question can be raised in the appellate court. The proper way to raise it is by demurrer when it is apparent on the face of the bill, and same may be raised for the first time in the appellate court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court. There is a preliminary stage in the bill, which will in turn be decided by the court.

legacy lapsing the rights of the residuary legatee will be affected. Whether the Court does or does not hold that there has been a disturbance of the manner of distribution as fixed by the will and a forfeiture under the forfeiture clause of the will, the right of the residuary legatee will be affected. The trial Court should not have proceeded with the case because of lack of necessary parties to the suit.

The appellant in his argument claims that if the necessary parties have not been made defendants to the bill; that the Appellate Court should remand the case to the trial Court with leave to make the necessary parties defendant. In this case this would be a useless procedure since we have already stated in this opinion, that the language is such that it does not need the aid of a Court of Equity to construe this will.

The appellant in his printed argument states "Renunciation by the life tenant to her interest under the will works an extinguishment of her life estate as effectively as her decease and it accelerates the rights of the remainder-men." If this proposition of law is correct, the only thing that remains to be done is to have the trustee pay to the complainant, Grace Hayden Walker, and to her brother, Robert H. Hayden, the corpus of the trust estate. It is the opinion of this Court that the bill was filed under a misconception of the law. (Deems vs. Miller, 303 Illinois, 240 -- Keeton vs. Tipton, 184 Kentucky, S. W. 909.) It is not necessary for a Court of Equity to construe the will to compel the trustee to make such payments if appellant's contention is correct.

The will is clear and unambiguous that at the time of Marian Niles Hayden's decease, this fund should be paid to her children. We are of the opinion that the trial Court properly held that the amended bill of complaint did not state a cause of action. The Court properly dismissed the bill for want of equity. The decree of the Circuit Court of Knox County is hereby affirmed.

Decree affirmed.

...the rights of the primary legatee will be affected.
Whether the Court does or does not hold that there has been a forfeiture
of the manner of distribution as fixed by the will and a forfeiture under
the forfeiture clause of the will, the right of the primary legatee
will be affected. The trial Court should not have proceeded with the
case because of lack of necessity applied to the will.

The appellant in his argument claims that it is unnecessary
to have had been made defendant to the will; but the Appellate
Court should reverse the case to the trial Court with leave to make the
necessary parties defendant. In this case this would be a needless
proceedure since we have already stated in this opinion, and the
language is such that it does not need the aid of a Court of Equity to
execute this will.

The appellant in his stated argument states "in violation of
the life tenant to have interest under the will which is extinguishment of
her life state as effectively as her decease and it accelerates the
rights of the remainder-men." If this proposition of law is correct, the
only thing that remains to be done is to give the trustee say to the
trustee, Grace Hayden Walker, and her brother, Robert H. Hayden,
the corpus of the trust estate. It is the opinion of this Court that
the bill was filed under a misapprehension of the law. (Quinn vs. Miller,
303 Illinois, 240 -- Boston vs. Fitch, 184 Kentucky, 217.)

It is not necessary for a Court of Equity to construe the will so as to
the trustee to make such changes as it considers its administration is correct.
The will is clear and unambiguous that at the time of making
Grace Hayden's devise, that she should be paid to her children, as
one of the opinion that the trial Court properly held that the amended
bill of complaint did not state a cause of action. The Court properly
dismissed the bill for want of equity. The devise of the property
Court of Knox County is hereby affirmed.

George Williams.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

87 17
AT A TERM OF THE APPELATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

273 I.A. 634/

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D., 1933.

JOHNSON BROS., A Copartnership
Composed of ALEX JOHNSON and
SOLOMON JOHNSON,
Appellees,

Appeal from
Circuit Court,
Kane County.

vs.

HERMAN VIERKE, Sheriff of Kane
County, Illinois,
Appellant.

WOLFE -- P. J.

This case was before this Court at the May term, 1925, at which time the case was reversed and remanded to the Circuit Court of Kane County. The case is reported in Volume 238 at 647 Ill. App. Court Reports. After remanding order was filed in the Circuit Court of Kane County the case again came on for hearing and a judgment was entered in favor of the plaintiff, the same as in the first hearing. The defendant below again brings the case to this Court on appeal for review.

The appellant seriously contends that the evidence in the second trial is practically the same as in the first trial, and that the case should again be reversed as the judgment of the Court is contrary to law, and to the manifest weight of the evidence. It is insisted by the appellee that the evidence at the second trial is clearer and more convincing than in the first trial, and that in addition thereto one August Baert, owner of the property that was claimed to have been sold to the appellees, testified and gave his version of the transaction.

The facts are set forth and discussed fully in the former case

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County, Illinois.
Appellant.

This case was before this Court in the term 1963.

The appellant testified that the evidence in the first trial was practically the same as in the first trial, and that the case should again be reversed as the judgment of the jury was against the law, and to the uniform belief of the witnesses. It is pointed out that the evidence of the second trial is almost the same as the evidence in the first trial, and that in addition to the testimony of the witnesses, the owner of the property has been called to the witness stand, testified and gave his version of the transaction. The facts are set forth and discussed fully in the former case.

and the law applicable to such facts is therein stated. After a review of all the evidence, it is our opinion that the sale of twenty-one head of cows to Johnson Brothers, and the sale of eighteen heifers and six horses to Van Derhoff, and thirteen head of cattle being shipped by Johnson Brothers for Baert all on the same day, constituted a sale in bulk of a majority of the vendor's business, and was not done in the ordinary course of business and thereby the provisions of the Bulk Sale Act were violated. --Weskalnies vs. Hesterman, 288 Ill., 199 and LaSalle County vs. LaSalle Amusement Company, 289, 194.

We reaffirm what we said in our former opinion relative to the facts and the law of this case. The judgment of the Circuit Court of Kane County is hereby reversed.

Judgment reversed.

and the law applicable to such facts is then invoked. After a review of all the evidence, it is our opinion that the sale of property was made to Johnson Brothers, and the sale of interest in the business was made to Van Dusen, and the head of the family (named) in Johnson Brothers was left all on the same day, notwithstanding a sale in bulk of a majority of the vendor's business, and was not made in the ordinary course of business and thereby the provisions of the said Act were violated. -- *Westlake vs. Westlake*, 100 Ill., 102 and 103. *Local 20 vs. Local 20*, 100, 101, 102, 103.

We testify that we said in our former opinion relative to the facts and the law of this case. The language of our circuit court of Kane County is hereby reversed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 634²

BE IT REMEMBERED, that afterwards, to-wit: On

modified

FEB 23 1934

the/opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

Johnson Bros., a Copartnership
Composed of Alex Johnson and
Solomon Johnson,

Appellees,

vs.

Appeal from the Circuit Court

of Kane County

Herman Vierke, Sheriff of Kane
County, Illinois,

A ppellant,

WOLFE: - P.J.

This case was before this Court at the May term, 1935, at which time the case was reversed and remanded to the Circuit Court of Kane County. The case is reported in Volume 238 at 647 Ill. App. Court Reports. After the remanding order was filed in the Circuit Court of Kane County the case again came on for hearing and a judgment was entered in favor of the plaintiff, the same as in the first hearing. The defendant below again brings the case to this Court on appeal for review.

The appellant seriously contends that the evidence in the second trial is practically the same as in the first trial, and that the case should again be reversed as the judgment of the Court is contrary to law, and to the manifest weight of the evidence. It is insisted by the appellee that the evidence at the second trial is clearer and more convincing than in the first trial, and that in addition thereto one August Baert, owner of the property that was claimed to have been sold to the appellees, testified and gave his version of the transaction.

The facts are set forth and discussed fully in the former case and the law applicable to such facts is therein stated. After a review of all the evidence, it is our opinion that the sale of twenty-one head of cows to Johnson Brothers, and the sale of eighteen heifers and six

In the Appellate Court of Illinois

Second District

October Term, A.D. 1932

Johnson Bros., a Copartnership
Composed of Alex Johnson and
Solomon Johnson,

Appellees,

Appeal from the Circuit Court

vs.

of Kane County

Herman Vicker, Sheriff of Kane
County, Illinois,

A appellant,

WORTH: - P. 1.

This case was before this Court at the May term, 1932, at which time the case was reversed and remanded to the Circuit Court of Kane County. The case is reported in Volume 232 at 84 Ill. App. Court Reports. After the remanding order was filed in the Circuit Court of Kane County the case again came on for hearing and a judgment was entered in favor of the plaintiff, the same as in the first hearing. The defendant below again brings the case to this Court on appeal for review.

The appellant seriously contends that the evidence in the second trial is practically the same as in the first trial, and that the case should again be reversed as the judgment of the Court is contrary to law, and to the manifest weight of the evidence. It is insisted by the appellee that the evidence at the second trial is clearer and more convincing than in the first trial, and that in addition thereto one August Bert, owner of the property that was claimed to have been sold to the appellees, testified and gave his version of the transaction. The facts are set forth and discussed fully in the former case and the law applicable to such facts is therein stated. After a review of all the evidence, it is our opinion that the sale of twenty-one head of cows to Johnson Brothers, and the sale of eighteen heifers and six

horses to Van Derhoff, and thirteen head of cattle being shipped by Johnson Brothers for Baert all on the same day, constituted a sale in bulk of a majority of the vendor's business, and was not done in the ordinary course of business and thereby the provisions of the Bulk Sale Act were violated -- Weskalnies vs. Hesterman, 288 Ill. 199, and La Salle County vs. La Salle Amusement Company, 289 Ill. 194.

We affirm what we said in our former opinion relative to the facts and the law of this case. The judgment of the Circuit Court of Kane County is hereby reversed and remanded to said court with directions for said court to enter an order that the defendant, Herman Vierke, recover of the plaintiffs, Johnson Brothers, a co-partnership composed of Alex Johnson and Solomon Johnson, possession of the property described in the writ of replevin, with nominal damages and costs of suit; and that execution issue therefor, and that a writ of retorno habendo issue therein.

Reversed and remanded with directions.

damages as provided by law

*Mr. [unclear]
3-28-34*

horses to Vgn Derhoff, and thirteen head of cattle being shipped by
Johnson Brothers for Bear All on the same day, constituted a sale in
bulk of a majority of the vendor's business, and was not done in the
ordinary course of business and thereby the provisions of the Bulk Sale
Act were violated -- *Weeks v. Westerman*, 288 Ill. 122, and *La Salle*
County vs. La Salle Amusement Company, 299 Ill. 194.
We affirm what we said in our former opinion relative to the facts
and the law of this case. The judgment of the Circuit Court of Kane
County is hereby reversed and remanded to said court with directions
for said court to enter an order that the defendant, Herman Viorke,
recover of the plaintiffs, Johnson Brothers, a co-partnership composed
of Alex Johnson and Solomon Johnson, possession of the property describ-
ed in the writ of replevin, with ~~minimal damages and costs of suit~~;
and that execution issue therefor, and that a writ of return habendo
issue therein.
Reversed and remanded with directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 634³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT.

THE UNION NATIONAL BANK
OF STREATOR,

Defendant in Error.

vs.

Writ of Error
To Circuit Court,
LaSalle County.

LUCY MOHAN, ANNA COMISKY,
R? F. PURCELL and MARY E.
MOHAN,

Plaintiffs in Error

WOLFE -- P. J.

On November 14, 1930, the Union National Bank of Streator, Illinois, filed a bill of complaint in the circuit court of LaSalle County, alleging that at the October term, 1929, of said court, it obtained a judgment against Lucy Mohan and Joseph L. Mohan for the sum of \$6,657.86 and costs of suit; that an execution was issued thereon and returned, marked, 'no property found'; and that no part of the said judgment has been paid.

It is further alleged that on October 17, 1910, one Hugh Comisky died, testate, the owner of W. 84 acres of land in LaSalle County, Illinois; that his will was admitted to probate, and that by said will he devised to his wife, Eliza Comisky, a life estate in said real estate, with remainder to his son, Edward Comisky, subject to a legacy of \$4,000.00 to Lucy Mohan, which legacy was made a lien on said real estate, and which was to be paid said Lucy Mohan one year after the death of Eliza Comisky; that said Eliza Comisky died October 2, 1930.

It was further alleged that said Edward Comisky and Anna Comisky his wife, on August 29, 1921, executed to E. H. Bailey, Trustee,

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It was further alleged that said Edward Doolittle and Anna
Doolittle, his wife, on August 29, 1925, executed an O. G. Will, to wit,
Last of Eliza Doolittle; that said Eliza Doolittle died October 2, 1925.
Estate, and which was to be sold said Lucy Wolman one year after the
of \$4,000.00 to Lucy Wolman, which Lucy Wolman was made a life tenant
estate, with remainder to his son, Edward Doolittle, subject to a life
will be devised to his wife, Eliza Doolittle, a life estate in said real
County, Illinois; that his will was admitted to probate, and that by said
high County died, testate, the owner of W. 24 Acres of land in Section 15,

a trust deed on the aforesaid real estate to secure payment of promissory notes aggregating the sum of \$10,000.00, which notes were due August 29, 1926, and are unpaid and held by R. F. Purcell; that Edward Comisky died, testate, February 23, 1926, and that his will was admitted to probate on May 21, 1926, and that by his will he devised all of his property to his wife, Anna Comisky; that the estate of Hugh Comisky has been settled, and that of Edward Comisky is in process of settlement, and that by virtue of the provisions of the wills of Hugh Comisky and Edward Comisky it is the duty of Anna Comisky to pay the 4,000.00 legacy, one year after the death of Eliza Comisky, to Lucy Mohan.

It is then charged that Lucy Mohan is confederating with persons unknown to complainant, to injure and defraud it and not pay it the said judgment. The bill prays for an answer under oath, and also prays that Lucy Mohan make discovery of all her property, and that she be decreed to pay it the amount due; that Anna Comisky and R. F. Purcell, or one of them, be decreed to pay complainant said \$4,000.00 legacy, and that Lucy Mohan be enjoined from selling or intermeddling with any debts or demands due her.

An injunction was issued in accordance with the prayer of the bill.

On February 24, 1931, the complainant filed its supplemental bill, in which the same facts were set forth as in the original bill, and by way of supplement it was alleged that since the filing of the original bill, and on October 22, 1930, there was filed in the office of the recorder, a deed of assignment and sale by Lucy Mohan to Mary E. Mohan of her \$4,000.00 legacy. Said assignment was dated January 2, 1930. The bill charges that there was no consideration for such assignment, and that it was fraudulent, null and void, and made for the purpose of placing the same beyond the reach of the complainant. The bill prays for an answer, under oath; that the assignment be set aside; that said Lucy Mohan be decreed to pay the complainant said bequest of \$4,000.00, and for such other and further relief as equity might require.

Lucy Mohan and Mary E. Mohan filed a sworn answer to the bill. They admitted the recovery of the judgment, the ownership of the real estate, the legacy of \$4,000.00, and the death of Hugh Comisky, and the execution of the \$10,000.00 mortgage to pay the trust deed. The answer further states that Joseph L. Mohan at the time of the death of his father, Patrick, purchased 160 acre farm, that belonged to the father; that he did not have money enough to pay for the same and he borrowed from Mary E. Mohan the sum of \$5,000.00, and gave his note for that amount; that no part of the \$5,000.00 had been paid, and that Joseph L. Mohan and his wife had borrowed other money from Mary E. Mohan, so that at the time of filing the answer they were indebted to Mary E. Mohan in the sum of about \$6,000.00; that they had given no security for this borrowed money; that on January 2, 1930, Lucy Mohan executed a contract of sale and assignment for \$4,000.00, as collateral security for the money which had been borrowed; that such assignment was made before the judgment referred to in the bill of complaint.

The case was referred to the Master in Chancery to take testimony and report his conclusions of facts and law. The Master found the issues in favor of the complainant, and that the assignment of the legacy was fraudulent as to them. Objections were filed to the report, which were overruled. The same were allowed to stand as exception in the circuit court. On a hearing before the chancellor the exceptions were overruled, and a decree was entered in favor of the complainant as recommended in the Master's report.

At the hearing before the Master, complainants called Mary Mohan as a witness. She gave her version of the whole transaction. She testified that her brother purchased the 160 acre farm of her father from the other heirs; that she got no money for her share of the estate, but that her brother Joseph gave his individual note to her for \$5,000.00; that on or about May 1, 1929, the note not having been paid, a new note was given and the old note destroyed; that she heard that the bank was

In my opinion and Mary E. Mohan filed a sworn answer to the bill. They admitted the recovery of the judgment, the ownership of the real estate, the legacy of \$4,000.00, and the assets of said legacy, and the execution of the \$10,000.00 mortgage to pay the said debt. The answer further states that Joseph L. Mohan at the time of the death of his father, Patrick, purchased 180 acre farm, that belonged to the father; that he did not have money enough to pay for the same and he borrowed from Mary E. Mohan the sum of \$2,000.00, and gave his note for that amount; that no part of the \$2,000.00 had been paid, and that Joseph L. Mohan and his wife had borrowed other money from Mary E. Mohan, so that at the time of filing the answer they were indebted to Mary E. Mohan in the sum of about \$6,000.00; that they had given no security for the borrowed money; that on January 2, 1920, they had executed a contract of sale and assignment for \$4,000.00, as collateral security for the money which had been borrowed; that such assignment was made before the judgment referred to in the bill of complaint.

The case was referred to the Master in Chancery to take testimony and report his conclusions of facts and law. The Master found the issues in favor of the complainant, and that the assignment of the legacy was fraudulent as to them. Objections were filed to the report, which were overruled. The same were allowed to stand as exceptions in the circuit court. On hearing before the exceptions were overruled, and a decree was entered in favor of the complainant as recommended in the Master's report.

At the hearing before the Master, complainants called Mary Mohan as a witness. She gave her version of the whole transaction. She testified that her brother purchased the 180 acre farm of his father from the other heirs; that she got no money for her share of the estate, but that her brother Joseph gave his individual note to her for \$2,000.00; that on or about May 1, 1920, the note had not been paid, a new note was given and the old note destroyed; that she heard that the bank was

pushing her brother and sister-in-law for the money that was due them, and she asked her nephew, - who was a lawyer, -- to try to protect her interest; that she took the assignment of the legacy in question as collateral security for the debt due her from her brother and sister. The note was signed by the brother Joseph alone and not by his wife Lucy. She further testified that at the time she took the assignment for the \$4,000.00 that she paid Lucy Mohan no money or other valuable consideration for the assignment, but the only purpose of taking it was to protect her on the note she held against Joseph Mohan.

Lawrence Snowden called as a witness on behalf of the complainant testified that he lived at Streator and was cashier of the Streator bank and had been for quite a number of years; that he was acquainted with the defendants and knew of the indebtedness that existed between the bank and Joseph Mohan and his wife. He said, 'that the notes were assigned were for money borrowed and given to the credit of Joseph L. Mohan. Mrs. Mohan was the surety on the note. He also testified as to the judgment being taken on the notes.

There was a stipulation entered into between the parties to the suit that the bank had recovered judgment for the amount stated in the bill; that Hugh Comisky, by his will, devised to his wife a life estate in certain real estate, and the remainder to his said son, Edward, subject to his wife's life estate and subject to the payment of a legacy of \$4,000.00 to his daughter, Lucy, which legacy was to be paid one year after the death of Eliza Comisky, and was made a lien on the real estate; that Edward Comisky died October 2, 1930; that Edward J. Comisky and Hugh Comisky were both dead, and that by reason of the provisions of the will of Hugh Comisky and the provision of the will of Edward Comisky, it became the duty of Anna Comisky to pay Lucy Mohan the \$4,000.00 one year after the death of Eliza Comisky, and that the legacy is now due Lucy Mohan. Included in said stipulation was "Exhibit 1", which is as follows:

...and the asked her brother, -- you was a lawyer, -- to get the ...
...; that she took the assignment of the ...
...for the fact the law firm was ...
...note was given by the brother ...
...The brother testified that at the time she took the ...
...\$4,000.00 that she paid Mary ...
...for the assignment, but the only purpose of taking it was
to protect her on the note she held against Joseph ...
...Lawrence Snowden acted as a witness on behalf of the
...testament testified that he lived at first and was ...
...testator bank and had been for quite a number of years; that he was
...connected with the defendants and knew of the indebtedness that existed
between the bank and Joseph ... and his wife. He said, "I ...
...were assigned some for money borrowed and given to the credit of
...L. ... was the owner of the note. He also
testified as to the judgment being given on the note.
There was a stipulation entered into between the parties
to the suit that the bank had recovered judgment for the amount ...
in the bill; that such ... by his will, bequeathed to his wife ...
...in certain real estate, and was ...
...subject to his wife's life estate and subject to the payment
of a legacy of \$4,000.00 to his daughter, Mary, upon ...
...one year after the death of ...
...on the real estate; that ...
...L. ... were both dead, and that ...
of the provisions of the will of ... and the provision of the
will of ... it became the duty of ...
Mary ... one year after the death of ...
and that the legacy is now due Mary ...
as Exhibit I, which is as follows:

"5000.00

"Streator, Illinois,
May, 1929."

"Two years after date, we, or either of us, promise to pay to Mary Mohan, or order, the sum of Five Thousand Dollars for value received, at the Peoples Trust and Savings Bank of Streator, with interest payable annually at the rate of five per cent per annum, including power of attorney to confess judgment. Due May 1, 1931."

(signed) Joseph L. Mohan."

There is very little, if any, dispute as to the facts in this case. The answer of the defendants was under oath and it is the contention of the plaintiffs in error that in order for the defendant in error, to maintain its suit, it is necessary for it to produce two witnesses to testify, before they could overcome the effect of the sworn answer of the plaintiffs in error. While some of the courts have stated this to be the rule, we are of the opinion that this is not a correct statement of the same, but that it is more accurate to say that the answer in such case when sworn to, is made evidence by the Statute so far as it is responsive to the bill, and as evidence can be overcome by only two witnesses or one witness and strong corroborating circumstances. This statement of law is supported by the case of Miller v. Armstrong, 169 App. 185, and followed by this court in the case of Krieder v. Sterling National Bank, 230 App. 360.

The question then is: 'Has the original complainant supported its case by the degree of evidence to entitle them to a decree in this case?' As before stated, a great many of the facts are not in dispute, as the stipulation admits them to be facts.

Mary E. Mohan testified that the brother Joseph bought 160 acre farm from his father and that instead of taking money for her share of the estate, her brother Joseph gave her his promissory note for \$5,000.00 and that amount represents the money for her share of the estate; that the note in question was a note given in renewal of

Chicago, Illinois,
May 1, 1931.

Two years after date, we, or either of us, wishes to pay to

any person, or order, the sum of five thousand dollars on order received
of the Peoples Trust and Savings Bank of Chicago, with interest payable
annually at the rate of five per cent per annum, including power of
attorney to collect judgment. One May 1, 1931.

(Signed) Joseph J. Joseph.

There is very little, if any, dispute as to the facts in

this case. The answer of the defendants was under oath and it is the
testimony of the plaintiffs in error that in order for the defendant
in error, to maintain its suit, it is necessary for it to produce two
witnesses to testify, before any validly executed the decree of the court
answer of the plaintiffs in error. While some of the courts have stated
this to be the rule, we are of the opinion that this is not a correct
statement of the rule, but that it is more accurate to say that the
answer in such cases when sworn to, is not evidence of the estate as
far as it is responsive to the bill, and no evidence can be introduced
by only two witnesses on the witness and strong corroborating circum-
stances. This statement of law is supported by the case of Miller
v. Grant, 137 Ill. 433, and followed by this court in the case of
Chicago v. Irving National Bank, 203 Ill. 433.

The question then is: Has the evidence and testimony

supported its case by the degree of evidence on either side as is required
in this case? As before stated, a great many of the facts are not in
dispute, as the stipulation admits that to be true.

My E. Nelson testified that the brother Joseph Joseph

100 acre farm from his father and that Joseph J. Joseph owned for many
years of the estate, nor brother Joseph gave her the necessary note
for \$2,000.00 and that amount represents the money for her share of
the estate; that the note in question was a note given in renewal of

the first note that her brother had given her for the land. She testified that Lucy Mohan at no time signed either of the notes; that the note and the assignment was the only writing that she had relative to the whole transaction. She further testified that there was no money passed between herself and her sisterinlaw at the time of the assignment, but that the same was made to protect her for the money that she had loaned her brother Joe.

After an examination of the whole record we are of the opinion that the claimants have proven their case by the degree of proof that the law requires, and that the court properly found, that, so far as the transaction between Lucy and Mary Mohan was concerned, it was fraudulent as to the complainant bank. The decree of the circuit court of LaSalle County should be and is hereby affirmed.

Decree affirmed.

the first note that her brother had given her for \$100.00.

testified that Mary John at no time signed either of the notes; that the note and the assignment was the only writing that was put in the

to the whole transaction. The witness testified that there was no
any passed between herself and her sister-in-law at the time of the
assignment, but that the same was made to protect her for the money
that she had loaned her brother Joe.

After an examination of the whole record made on the

opinion that the elements have shown this case by the record of
proof that the law requires, and that the court properly found, that
as far as the transaction between Mary and Mary John was concerned,
it was fraudulent as to the complainant bank. The degree of the fraud
agent of DeKalb County should be and is hereby affirmed.

Order affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 634⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 10 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:



In the Appellate Court of Illinois

Second District

May Term, A. D. 1932

Marie Sites,

Defendant in error,

vs.

Error to the Circuit Court

of Carroll County

David Gillogly,

Plaintiff in error,

Dove-J.

Marie Sites, plaintiff below, defendant in error in this court, instituted this action to recover damages for personal injuries sustained by her while she was riding as a guest of her brother Joseph Doll, in his car, which collided with a car driven by David Gillogly, defendant below, plaintiff in error in this court.

The declaration consisted of three counts. In the first count it was alleged that the plaintiff in error, on the evening of May 12, 1930, was driving his automobile on Route 27, in an easterly direction, and at the same time Joseph Doll was driving his automobile upon the same highway in a westerly direction. That defendant in error was riding in said automobile with Joseph Doll as his guest, and was in the exercise of reasonable care for her safety. That plaintiff in error disregarded his duty to exercise reasonable care, but negligently drove his car into the Doll car, resulting in the collision, and as a result thereof defendant in error was seriously and permanently injured. In the second count it was alleged that plaintiff in error suddenly and abruptly swerved his automobile from the south side of said highway to the north side thereof, and attempted to make a left hand turn from said highway directly in front of and in the path of the automobile in which defendant

In the Appellate Court of Illinois

Second District

May Term, A. D. 1934

Marie Sizer,

Defendant in Error,

vs.

vs.

of Carroll County

David Sizer,

Plaintiff in Error,

vs.

Marie Sizer, Plaintiff below, Defendant in Error in this

count, instituted this action to recover damages for personal in-

juries sustained by her while she was riding as a guest of her

brother Joseph Sizer, in his car, which collided with a car driven

by David Sizer, Defendant below, Plaintiff in Error in this

count.

The declaration consisted of three counts. In the first

count it was alleged that the Plaintiff at about 10:00 p.m. on the evening

of May 12, 1930, was driving his automobile on Route 37, in an

easterly direction, and at the same time Joseph Sizer was driving

his automobile upon the same highway in a westerly direction.

That Defendant in Error was riding in said automobile with

Joseph Sizer as its driver, and was in the exercise of reasonable

care for her safety. That Plaintiff in Error disregarded his

duty to exercise reasonable care, but negligently drove his

car into the path of the car, resulting in the collision, and as a

result thereof Defendant in Error was seriously and permanently

injured. In the second count it was alleged that Plaintiff

in Error suddenly and abruptly crossed his automobile from the

south side of said highway to the north side thereof, and

attempted to make a left hand turn from said highway directly

in front of and in the path of the automobile in which Defendant

in error was riding, without any warning of his intention to do so, and the collision was caused thereby. In the third count the charge of negligence as stated in the second count was repeated, and it was further alleged that plaintiff in error was driving his automobile on the public highway after dark without lights, contrary to the provisions of the Statute whereby the driver of the car and the defendant in error were both prevented from discovering the presence of plaintiff's in error's automobile and the collision resulted by reason thereof. A plea of the general issue was filed and the trial in the lower court resulted in a verdict for \$4,000.00, in favor of the defendant in error, upon which, after motions for a new trial and in arrest of judgment were overruled, judgment was rendered and the record is brought to this court for review.

The evidence discloses that Route 27 runs east and west in a straight line at the place of the collision; that a gravel road extends north and south and intersects Route 27 at right angles at a point about forty-five feet from the point of collision. Plaintiff in error, David Gillogly, and his hired man, Harry Shake, were returning from Savanna in plaintiff in error's five passenger Studebaker sedan, and plaintiff in error was driving. They were on their way to the home of plaintiff in error, who lived a short distance north on the gravel road, and plaintiff in error had reduced the speed of his car in order to turn north. The night was dark. The defendant in error, her brother, Joe Doll, who was driving his Chevrolet coupe, and Marjorie Marcovitch left Savanna about 8:00 o'clock in the evening on Route 27, going east for about three miles to the top of Weidman's hill, where they turned around and started west, back to Savanna on Route 27. According to their testimony, after they had turned around they were proceeding between 40 and 45 miles per hour and as they approached the intersecting gravel highway running north

in error was riding, without any warning of the collision to do so, and the collision was caused thereby. In the third count the charge of negligence as stated in the second count was repeated, and it was further alleged that plaintiff in error was driving his automobile on the public highway after dark without lights, contrary to the provisions of the Statute whereby the driver of the car and the defendant in error were held prevented from recovering the proceeds of plaintiff's in error's automobile for the collision resulted by reason thereof. A plea of the General Issue was filed and the trial in the lower court resulted in a verdict for \$1,000.00 in favor of the defendant in error, upon which, after motion for a new trial and in arrest of the judgment was overruled, judgment was rendered and the record is brought to this court for review. The evidence discloses that about 8:00 p.m. on the night of the collision, a straight line at the place of the collision; that a gravel road extends north and south and intersects Route 27 at right angles at a point about forty-five feet from the point of collision. Plaintiff in error, David Calliope, and his three sons, Henry, George, and William, were returning from Geneva in plaintiff in error's five passenger stakebed car, and plaintiff in error was driving. They were on their way to the home of plaintiff in error, who lived a short distance north on the gravel road, and plaintiff in error had reduced the speed of his car in order to turn north. The night was dark. The defendant in error, her brother, Joe Calliope, who was driving his Chevrolet coupe, and her two sons, George and William, were returning from Geneva in the evening on Route 27, going east for about three miles to the top of Williams' Hill, where they turned around and started west, down the hill on Route 27. According to both testimony, after they had turned around they were proceeding between 40 and 45 miles per hour and as they approached the intersection of the gravel road and Route 27, they were proceeding between 40 and 45 miles per hour and

and south, they did not see any car approaching from the opposite direction, and none of them observed the plaintiff in error's car until they were within thirty or forty feet of it. They all testified that Doll was driving his car on the north or right hand side of the road; that the front headlights on the Doll car were burning; that the plaintiff in error had no lights on his car and that he was driving on their side of the road or had started to turn north and had the front part of his car extending over the black line when the collision occurred.

The plaintiff in error testified that he, with Mr. Shrake, was returning to his farm and driving east on Route 27. That the lights were burning on his car. That as he approached the school house signed, he slowed down as he always did in order to turn north on the gravel road. That he looked up and down the road and saw lights coming toward him about half way up the hill. That he was going about twenty miles an hour and was about to make the turn to his home when the collision occurred. He further testified that the Doll car was coming straight toward him and that ~~at~~ at the time of the collision he was on his proper traffic lane, being on the right hand side of the road as you go east, and that the Doll car was over on his traffic lane. The testimony of plaintiff in error was corroborated by Harry Shrake.

Other witnesses testified as to the position of the cars after the collision and that rubber tire marks were observed which started about two inches from the center of the black line on the south side and extended diagonally across the south side of the pavement and also other rubber tire marks and broken glass were found on the north side of the pavement. After the collision the Doll car was on the north side of the pavement in the ditch, and the Gillogly car on the south side of the pavement and the condition of each car appears from photographs taken shortly after the collision.

and south, they did not see any car approaching from the opposite direction, and none of them observed the plaintiff in error's car until they were within thirty or forty feet of it. They all testified that Doll was driving his car on the north or right hand

side of the road; that the front headlights on the Doll car were burning; that the plaintiff in error had no light on his car and that he was driving on the left side of the road or had started to turn north and had the front light of his car extending over the black line when the collision occurred.

The plaintiff in error testified that he, with W. Simpson, was returning to his farm and driving east on Route 27. That the lights were burning on his car. That as he approached the school house sign, he slowed down as he always did in order to turn north on the gravel road. That he looked up and down the road and saw lights coming toward him about half way up the hill.

That he was going about twenty miles an hour and was about to make the turn to his farm when the collision occurred. He further testified that the Doll car was coming straight toward him and that at the time of the collision he was on his proper traffic lane, being on the right hand side of the road as you go east, and that the Doll car was over on the traffic lane. The testimony of plaintiff in error was contradicted by Wm. Simpson.

Other witnesses testified as to the position of the cars after the collision and that within five minutes thereafter Doll started about two blocks from the corner of the block on the south side and extended diagonally across the south side of the pavement and also other tracks the car and broken glass were found on the north side of the pavement. After the collision the Doll car was on the north side of the pavement in the block, and the Cilly car on the south side of the pavement and the condition of each car appears from photographs taken shortly after the collision.

It was the contention of the defendant in error in the lower court, and her contention here that the Doll car, in which she was riding, was in its proper traffic lane and that the proximate cause of the collision was the acts of plaintiff in error in driving his car without front lights and while attempting to turn on the intersecting gravel road, he turned into the north traffic lane on Route 27 without passing to the right of the center of the intersection. Plaintiff in error contends that the weight of the evidence discloses that the lights on his car were burning; that the defendant in error and the driver of the car in which she was riding were not in the exercise of due care; that the allegations of the second and third counts of the declaration were not sustained by the evidence and the trial court therefore erred in refusing a peremptory instruction in his behalf, and that the giving to the jury of the sixth instruction tendered by defendant in error was reversible error.

According to the testimony of defendant in error and her witnesses, the car in which she was riding was proceeding in its proper traffic lane at a not unreasonable rate of speed, when suddenly the car of plaintiff in error was observed approaching in an opposite direction, without front lights and in the same traffic lane upon which the car in which defendant in error was travelling. According to the testimony of plaintiff in error and his witness, he was proceeding in his own traffic lane at a reasonable rate of speed, about to turn into the intersecting highway to the left, but had not crossed over the black center line. He insists that the headlights on his car were burning and while he was in the exercise of reasonable care for his own safety, he was run into with great force by the car in which defendant in error was riding. Some of the physical facts tend to corroborate the version of the collision as contended for by plaintiff in error while others seem consistent with the theory

and version of the collision as detailed by defendant in error and her witnesses. The evidence is hopelessly conflicting. The jury heard and saw the witnesses, and it was their province to determine where the truth lay, and unless there was some substantial error in the instructions, we would not feel warranted in reversing this judgment.

Defendant in error testified that she was paying attention to the road and looking straight ahead, and it would seem from her testimony that she did all that a prudent and reasonable person could be expected to do under the same circumstances, and we cannot, as a matter of law, say she was not in the exercise of due care for her own safety. "Where there is any evidence before the jury which * * * tends to show due care, the question of due care is one for the jury." *Pienta v. Chicago City Railway Co.*, 284 Ill. 246. In our opinion, the evidence being conflicting, no error was committed by submitting the case to the jury upon all the counts of the declaration. In *Illinois Central R. R. Co. v Oswald*, 338 Ill. 270 at page 274, the court said: "Where a motion is made to direct a verdict for the defendant, the evidence may be examined for the purpose of determining whether, when all the evidence is considered in its aspect most favorable to the plaintiff, together with all reasonable intendments, there is a total failure to prove any element necessary to maintain the cause of action alleged."

Instruction No. 6 given on behalf of defendant in error is the only instruction complained of. This instruction is as follows: "The Court instructs the jury that the statute of the State of Illinois in force in May 1930, required that every person operating a motor vehicle at an intersection of public highways shall keep to the right of the center of such intersection of highway, and pass to the right of the intersection of such highways when turning to the left. You are further instructed that if

and version of the collision as testified by witnesses in court
and her appearance. The witness is absolutely confident.
The jury heard and saw the witness, and it was their province
to determine where the truth lay, and where there was some
substantial error in the instructions, we would not feel warranted
in reversing this judgment.

Defendant in error testified that she was paying attention
to the road and looking straight ahead, and it would be fair
her testimony that she did all that a prudent and reasonable woman
could be expected to do under the same circumstances, and she
cannot, as a matter of law, say she was not in the exercise of
due care for her own safety. There is no evidence of any
the jury which " " tends to show that the question of
care is one for the jury." *Smith v. Phillips*, 111 Ill. 60.
324 Ill. 246. In our opinion, the evidence being conflicting, no
error was committed by submitting the case to the jury upon all
the counts of the indictment. In *Illinois Central R. Co. v.*
Cawald, 323 Ill. 677 at page 674, the court said: "Where a witness
is made to show a verdict for the defendant, and evidence may
be furnished for the purpose of determining whether, when all the
evidence is considered in its proper light, it tends to the
affirmative, to show with all reasonable probability, that he is a
liability to prove any element necessary to sustain the charge of
action alleged."

Instruction No. 8 given on behalf of defendant in error is
the only instruction complained of. This instruction is as fol-
lows: "The Court instructs the jury that the statute of the State
of Illinois in force in May 1920, required every person
operating a motor vehicle at an intersection of public highways
shall keep to the right of the center of such intersection of
highway, and leave to the right of the intersection of such high-
ways when turning to the left. You are instructed that if

you find from a preponderance of the evidence that the defendant, David Gillogly, at the time and place in question, did not drive and operate his automobile so as to pass to the right of the center of the intersection when about to make a left turn onto the intersecting highway, but on the contrary did immediately prior to the accident turn to the left side of the highway on which he was proceeding and was about to make such left-hand turn and that such collision would not otherwise have occurred, such action, if any, in so doing may properly be regarded as proximately contributing to the accident, and to constitute negligence on the part of the defendant, David Gillogly."

The complaint made of this instruction is that it is misleading, because counsel say it told the jury that if they found from a preponderance of the evidence that Gillogly, immediately prior to the accident, turned his car to the left side of the highway on which he was proceeding and was about to make a left hand turn onto the intersecting highway, that such action may be properly regarded as proximately contributing to the accident. Counsel insist that if Gillogly had turned to the left side of the highway, he certainly had made a left handed turn, and if he had already turned he could not be about to make a left handed turn. This instructing is not susceptible of the strained construction counsel would place upon it. It does not necessarily follow that because he had turned into the left hand travel lane he had turned into the intersecting highway. The instruction must be considered in its entirety. Plaintiff in error testified that he was about to make a left turn into the intersecting highway. Whether he had passed over the black line in the center of the pavement into the traffic lane of the Doll car was a disputed question of fact. If he had and had not reached the center of the intersection, his conduct was not in accordance with the provisions of the Statute, and this instruction told the jury that if they

the defendant, David Millican.

[illegible]

found these facts from a preponderance of the evidence and further found that the collision would not otherwise have occurred, that such conduct constituted negligence. The instruction is in accordance with the theory of the defendant in error as to how the collision occurred, is based upon the evidence and is not erroneous for the reasons assigned by plaintiff in error, and is not subject to the criticism and construction directed against it by plaintiff in error.

There is no reversible error in this record, and the judgment of the Circuit Court of Carroll County is therefore affirmed.

JUDGMENT AFFIRMED.

found these facts from a comparison of the evidence and further
found that the collision could not have occurred, that
even contact constituted negligence. The investigation is in accord
with the theory of the defendant insofar as to the collision
also occurred, is based upon the evidence and is not inconsistent
for the reasons assigned by plaintiff in error, and is not contrary
to the evidence and construction directed against it by plaintiff
in error.
There is no reversible error in this record, and the judgment
of the Circuit Court of Carroll County is affirmed.

JUDGE ATTY.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

found these facts from a proper review of the evidence and further
found that the collision would not have occurred, that
such contact constituted negligence. The instruction is in accord
with the theory of the defendant in error as to how the collision
occurred, is based upon the evidence and is not erroneous
for the reasons assigned by plaintiff in error, and is not prejudicial
to the defendant and constitutes no error. It is affirmed.
There is no reversible error in this record, and the judgment
of the Circuit Court of Carroll County is therefore affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN P. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 634⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:



IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

THE SWORDS COMPANY, a
corporation,

Appellee

vs.

APPEAL FROM THE CIRCUIT
COURT OF WINNEBAGO COUNTY.

LEO MICHALE,

Appellant

DOVE-J.

Appellee brought its suit against appellant upon a book account before a Justice of the Peace, and recovered a judgment. Upon an appeal to the Circuit Court, a jury was waived and the cause was submitted to the court, resulting in a judgment in favor of appellee for One Hundred Forty-one and 35/100 Dollars (\$141.35) and appellant prosecutes this further appeal.

The evidence discloses that appellant had been employed by appellee as a salesman at a salary of Three Hundred Dollars per month and expenses, from December 8, 1918 to August 16, 1932, at which time he was discharged. During this period, appellant purchased numerous items of merchandise from appellee, which were charged to his account, and after crediting his account at the time of his discharge with One Hundred Fifty Dollars for one-half month's salary and with \$54.84 expenses incurred by him, there remained due from appellant to appellee, including a \$24.00 item hereinafter referred to, the sum of \$195.35. The

IN THE

FEDERAL COURT OF DISTRICT

OF THE DISTRICT

October Term, A. D. 1933.

THE PEOPLE OF THE DISTRICT OF COLUMBIA,
Plaintiff,

vs.

Appellee

CITY OF WASHINGTON, D. C.

vs.

THE DISTRICT OF COLUMBIA

Appellant

1933-1

Appellee brought its suit against appellant upon a book account before a Justice of the Peace, and recovered a judgment. Upon an appeal to the District Court, a jury was called and the case was submitted to the jury, resulting in a verdict for appellee for One Hundred Forty-one and 10/100 Dollars (\$141.55) and appellant presented this motion.

The evidence disclosed that appellant was then employed by appellee as a salesman at a salary of Three Hundred Dollars per month and expenses, from December 1, 1932 to August 15, 1933, at which time he was discharged. During this period, appellant exhibited numerous items of merchandise from appellee, which were charged to his account, and after crediting his account at the time of his discharge with One Hundred Fifty Dollars for one-half month's salary and with \$54.55 expenses incurred by him, there remained due from appellee to appellee, including a \$4.00 item hereinafter referred to, the sum of \$135.55. The

evidence further discloses that between August 16, 1932 and February 7, 1933, appellant made six payments upon his account aggregating \$30.00. Upon the trial, the court eliminated the item of \$24.00 with which appellant was charged, being the amount of an item assigned to appellee from the Swords Electric Company, and rendered judgment for \$141.35 as above stated.

Appellant concedes in his argument that he is not only justly indebted to appellee for \$141.35, but insists that the trial court erroneously eliminated the \$24.00 item acquired by appellee from the Swords Electric Company, and that if appellant was not entitled to an offset of \$300.00, being the price which appellant insists he was to receive for a Ford sedan which he sold and delivered to appellee in April 1924, the correct amount of the Judgment should have been \$165.35.

According to the testimony of appellant, which was in part corroborated by his brother-in-law, a former officer of appellee, he, appellant, had a conversation with T. E. Swords, an officer of appellee, on April 25, 1924, at which time appellant was told that if he would turn his Ford car into the Company, that the Company would allow him a credit of \$300.00 therefor, and that thereafter he did so. It further appeared that about the time appellee received the Ford car of appellant, appellee purchased a Reo car, which was turned over to appellant and he used it in transacting the business of the Company and also as a pleasure car. According to the testimony of appellant, he had a further conversation with T. E. Swords in the Spring of 1930, in which appellant was told that appellee was going to pay for the Ford car. It further appeared that Mr. T. E. Swords, with whom appellant had these conversations, died in the Fall of 1930.

The books of appellee disclosed the purchase of various items of merchandise by appellant while he was in the employ of appellee, and that he was continuously indebted to it. The books

...further disclose that between March 10, 1934 and
February 7, 1935, appellant was in account
... Upon the trial, the court awarded the
... of \$4.00 with which appellant was indebted, being the
amount of an item retained to a police from the ...
... and rendered judgment for \$11.55 as above stated.
Appellant conceded in his argument that he is not only in-
debted to appellee for \$11.55, but admits that the total
court erroneously eliminated the \$4.00 item retained to appellee
from the Florida Electric Company, and that if appellant was not
entitled to an offset of \$300.00, and the entire sum retained
against him was to receive on a bond which he sold to ap-
pellee in April 1934, the correct amount of the
judgment should have been \$165.55.
According to the testimony of appellant, when he in-
vestigated by his brother-in-law, a former officer of appellee,
he, appellant, had a conversation with T. E. Woods, an officer
of appellee, on April 20, 1934, at which time appellant was told
that it would turn his bond over into the company, and that
company would allow him a credit of \$300.00 thereon, and that
thereafter he did so. If appellant appeared that day the time
appellee received the bond out of appellee, appellee returned
a new set, which was turned over to appellee and retained it in
possession and custody of the company and from which appellant
... according to the testimony of appellant, he had a conversation
with T. E. Woods in the month of April, at which
appellant was told that appellee was going to pay him the bond.
It further appeared that Mr. T. E. Woods, when asked appellant was
that a conversation, also in the fall of 1934.
The books of appellee disclosed two credits of various
items of merchandise by appellant while he was in the employ of
appellee, and that he was continuously indebted to it. The books

were balanced at least twice each year and at various times during the years since 1924 statements and invoices showing the amount due from appellant to appellee were received by appellant, and no credit for this automobile ever appeared thereon, and at no time did he ever question the correctness of these statements or object to the fact that no credit had been given him for his Ford car, until this suit was instituted against him on February 4, 1933. The brother-in-law of appellant, who corroborated him as to the conversation with reference to the transaction in connection with the Ford car and the credit he was to receive therefor, was Secretary of appellee and had power to make charges and credits, yet no credit was ever made on the books of appellee. Appellant expressly acknowledged his indebtedness to appellee, both before and after his discharge from its service. He made payments upon his account and sought to discharge his obligation. For nine years he never insisted to any one that appellee was indebted to him to the extent of \$300.00 for his Ford car. Shortly prior to the institution of this suit, he acknowledged the amount of his indebtedness to the Company and said nothing to the Credit Manager of appellee about appellee owing him \$300.00. His conduct, after his discharge, as well as before, is inconsistent with his present contention that appellee is indebted to him.

The burden of proof to establish his set-off by a preponderance of the evidence, rested upon appellant. *East v. Crow*, 70 Ill. 91. The trial court saw and heard the witnesses testify. It was his province to determine the creditability of the witnesses and to weigh and consider their testimony. He was in a much better position than we are to determine the truth, and we are satisfied with his finding and judgment.

Being of the opinion that appellant has not met the requirement of the Law that cast upon him the burden of establishing his set-off by a preponderance of the evidence, it is unnecessary for us, in view of the fact that no cross errors have been assigned and no propositions of law submitted to the trial court,

were delivered at least twice each year and at various times during
the years since 1921 statements and invoices showing the amount
due from appellant to appellee were received by appellee, and in
credit for this automobile year appeared thereon, and it is true
did he ever mention the correctness of these statements or credit
to the fact that no credit had been given him for his Ford car,
until this suit was instituted against him on January 4, 1924.
The brother-in-law of appellee, who corroborates him as to the
conversation with reference to the transaction in question with
the Ford car and the credit for the same to appellee, was a
party of appellee and had power to make charges and credits, and
no credit was ever made on the books of appellee. In fact before
appellee acknowledged his indebtedness to appellee, both before
and after his discharge from his service. He was indebted to
his account and sought to discharge his obligation. The same
year he never failed to inform that appellee was indebted to
him to the extent of \$300.00 for his Ford car. In fact, when he
the institution of this suit, he acknowledged the amount of his
indebtedness to the company and said nothing to the contrary. He
of an alias about appellee owing him \$300.00. The company, after
his discharge, as well as before, its indebtedness to him was
contested that appellee is indebted to him.
The burden of proof to establish his indebtedness to appellee
was on the evidence, rested upon appellee, and it was
to him. The trial court saw and heard the evidence. It was
it was his province to determine the credibility of the wit-
nesses and to weigh and consider their testimony. It was in a
much better position than we are to determine the truth, and we
are satisfied with its finding and judgment.
In view of the opinion that appellee is indebted to him, and the
fact of the law that each man has the burden of establishing
his debt or liability, it is unnecessary
for us, in view of the fact that no error appears upon the re-
cord and no proposition of law submitted to this trial court,

to discuss or determine whether the \$24.00 item assigned by the Swords Electric Company to appellee and which accrued to the assignor before the set-off of appellant was barred by the Statute of Limitation thereby withdrew from the operation of that Statute appellant's set-off.

The judgment of the Circuit Court of Winnebago County is affirmed.

JUDGMENT AFFIRMED.

to discuss or consider whether the \$4.00 item included in the

words "directly" or "indirectly" or "through" or "by means of" or

any other words or phrases which might be construed to mean that the estate

of limitation thereby arising from the operation of that statute

is not a set-off.

The judgment of the Circuit Court of Kansas County is

affirmed.

LEWIS, JUDGE.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court



AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 635¹

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

WILLIAM H. KEIG,

Appellant,

vs,

Appeal from the Circuit

L. & G. FEED COMPANY,

Court of Lee County.

Appellee.

DOVE-J.

On March 8, 1929, appellant and appellee entered into a written lease by the terms of which appellant leased to appellee a certain two story brick and frame warehouse in the City of Rockford from and including March 15, 1929 to and including March 14, 1931, at a stipulated rental of \$375.00 per month in advance. The lease also provided that the lessee had the privilege to renew it upon the same terms for a period of three years after the date of its expiration, upon giving the lessor thirty days notice in writing of his intention so to do.

Appellee went into possession under the lease and remained in possession of the premises until the early part of June 1931, when it vacated. On September 11, 1931 appellant instituted a suit in the Circuit Court of Lee County against appellee to recover for three months rent. Subsequently, on December 21, 1932, this suit was begun, and upon a trial before the court, a jury having been waived, judgment was rendered in favor of appellant for \$825.00 and the record is brought to this court for review by the plaintiff below, appellant here.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1903.

WILLIAM H. KELSO,

Appellant,

vs.

Appeal from the Circuit

Court of Lee County.

J. A. G. FEND O'BRYEN,

Appellee.

DOV-1.

On March 8, 1885, appellant and appellee entered into a written lease by the terms of which appellant leased to appellee a certain two story brick and frame warehouse in the City of Rockford from and including March 15, 1885 to and including March 14, 1891, at a stipulated rental of \$275.00 per month in advance. The lease also provided that the lessee had the privilege to renew it upon the same terms for a period of three years after the date of its expiration, upon giving the lessor thirty days notice in writing of his intention so to do. Appellee went into possession under the lease and remained in possession of the premises until the early part of June 1891, when it vacated. On September 11, 1891 appellant instituted a suit in the Circuit Court of Lee County against appellee to re-cover for three months rent. Subsequently, on December 11, 1892, this suit was begun, and upon a trial before the court, a jury having been waived, judgment was rendered in favor of appellee for \$225.00 and the record is brought to this court for review by the plaintiff below, appellant here.

It was the contention of appellant in the court below and is his contention here that at the expiration of the term covered by the written lease, he elected to treat appellee as a tenant from year to year and seeks to recover rent for twelve months from March 14, 1931 at the rate of \$375.00 per month. Appellee takes the position that it held the premises after the expiration of its lease upon an agreement, or at least pending negotiations for an agreement wherein the rental was upon a monthly tenancy at the rate of \$275.00 per month.

As early as September 17, 1930, appellee wrote appellant calling attention to the deplorable business conditions in Rockford and stating: "We are looking forward now to the time when our rent lease will expire in March. At this time we expect to make a different arrangement as to the price we will pay should we remain in your building. We have our own idea of just about what the building is worth under present conditions, and we get this conclusion from the offers made to us by property owners who have leases coming due and want to re-rent their buildings. We also get ideas from general conditions that exist in every city at the present time. Should you want to confer with us on this subject, please let us know, or should you want to lease your building to some one else when our time is up, you can also let us know the arrangement so that we can secure a location in the meantime. We would, however, rather stay where we are and improve this place and extend our business in the same place where we started, providing we can reduce our overhead in the way of rental."

On September 22, 1930, appellant replied, in which he said: "In view of the fact that business generally is slow just at present, I am willing to grant you a reduction in rent of \$25.00 per month for one year, beginning March 1st next. If you wish to exercise your option for the three years according to your lease, the remaining two years would be at the present rate."

It was the contention of appellant in the court below and in his contention here that at the expiration of the term covered by the written lease, he elected to treat appellant as a tenant from year to year and seeks to recover rent for twelve months from March 15, 1931 at the rate of \$275.00 per month. Appellant takes the position that it held the premises after the expiration of the lease upon an agreement, or at least pending negotiations for an agreement wherein the rental was much less than \$275.00 per month.

As early as September 17, 1930, appellee wrote appellant calling attention to the deplorable condition in which the building was and stating: "We are looking forward now to the time when our new lease will expire in March. At that time we expect to make a different arrangement as to the rates we will pay because we remain in your building. We have had our idea of just what rent the building is worth under present conditions, and we get this information from the office made to us by property owners who have leases coming due and want to re-rent their buildings. We also get ideas from General Conditions that exist in every city at the present time. Should you want to enter into an agreement with us, please let us know, or should you want to leave your building to some one else then let us know, the one thing we know the arrangement is this: we can secure a location for the building. We would, however, rather stay where we are and improve this place and extend our business in the same place where we started, providing we can reduce our investment in the city of Seattle."

On September 22, 1930, appellant replied, in which he said: "In view of the fact that business generally is slow, but at present, I am willing to grant you a reduction in rent of \$2.00 per month for one year, beginning March 1st next. If you wish to exercise your option for the next years according to your lease, the remaining two years would be at the present rate."

On December 26, 1930 appellee wrote appellant again, referred to the fact that its lease would expire in a couple of months and that everything had been reduced half and concluded, "Rents will also have to stand the same reduction in order to keep the buildings occupied, and while we will be willing to give you plenty of time, we will be willing to stay there only at a rental of \$200.00. If it will be necessary for us to move, we want to be making plans for our location. *** If business had kept up in Rockford like it was the first six months, we would probably not have said anything about rent reduction, but as the buying power of Rockford, including farmers, has been reduced about 60%, we feel that we are fortunate to maintain as good a business as we have. We would be willing to rent the building on a temporary basis, say on 90 days notice to get out, thus giving you an opportunity to make other arrangements, or to lease to other parties if you get an opportunity."

On December 29, 1930, appellant replied as follows: "Regarding the rental, I realize that business in all lines is quite unsatisfactory at the present time, and for that reason I am going to offer you a very material reduction in your rent until such time as business changes for the better, and that is as follows: After March 15, 1931, I will make the rental \$275.00 per month. That would be for periods of three months. This is a reduction of \$100.00 per month, which is the very best I can offer."

On December 31, 1930, appellee replied as follows: "We are glad to know that your attitude is toward a readjustment of matters in accord with the present conditions and situations and there is no doubt but what we can get together on matters that concern us both when the time comes."

On February 2, 1931, appellee wrote again proposing to pay \$200.00 per month beginning April 1, 1931 for a ninety day period, and suggesting that the rent accruing between March 15th and April 1st be expended in cleaning up the building. Two/^{days}later

On December 20, 1930, appellee wrote appellant again, referring to the fact that the latter would know the contents of the letter and that everything had been received by the latter. "I also have to state that the letter is in order to keep the building completed, and while we will be willing to give you thirty days, we will be willing to stop there only at a rental of \$50.00. It is still the same. For us to move, we want to be working on the building. See if business had kept up in Rockford like it was the first six months, we would probably not have said anything about your reduction, but as the paying power of Rockford, including business, has been reduced about 50%, we feel that we are forced to maintain as good a business as we can. We would be willing to rent the building on a temporary basis, say for six months or less, but this, giving you an opportunity to make other arrangements, or to lease to other parties if you get an opportunity."

On December 20, 1930, appellant replied as follows: "Regarding the rental, I realize your business is all in a state of liquidation at the present time, and for that reason I am going to offer you a very material reduction in your rent. I will reduce the time as business changes for the better, and that is as follows: After March 15, 1931, I will make the rental \$50.00 per month. That would be for periods of three months. This is a reduction of \$100.00 per month, which is the very best I can offer."

On December 21, 1930, appellee replied as follows: "I am glad to know that your attitude is toward a permanent settlement in regard to the present conditions and situation and there is no doubt that we can get together in business. I consider as soon as the time comes."

On January 1, 1931, appellee wrote again, referring to the \$50.00 per month beginning April 1, 1931 for a three year period, and suggesting that the rent should be reduced to \$25.00 per month. "I am glad to see you are in a position to pay the rent. I am glad to see you are in a position to pay the rent. I am glad to see you are in a position to pay the rent."

and on February 4, 1931 appellant replied and repeated his former offer as follows: "I can only repeat what I wrote you in a recent letter, and that is that \$275.00 per month is the lowest rental that I can take for this property. *** The above rental would of course be for a limited period."

February 17, 1931, appellee answered as follows: "We note your consideration of the entire matter, and it is very reasonable, especially when you have a building of that size to look after. We would very much prefer to stay where we are, and I believe with your cooperation, we can work out a program whereby we will both be benefitted in case business takes a little turn for the better. The price of \$275.00 from March 15th will be quite a help to us, and as we have now rented part of the space, which we do not need, we think we can work out an expense program which will enable us to show a little profit as business up there is holding up remarkably well for this time of the year and for the condition of the city." Appellee then speaks of the former request to donate the rent for fifteen days between March 15th and April 1st and then concluded: "We believe that we will just battle it out right there and make it the greatest market that Rockford has ever had. If we get to going good, we may ask for you to put some windows in the front so that we might show our stock."

Appellant executed a lease in duplicate, dated March 14, 1931, for the term commencing March 15, 1931. This lease contained no expiration date, but provided that it could be terminated by either party giving the other sixty days notice. Appellant signed both of them and gave them to Paul Gard, the manager of appellee, in Rockford. Appellant testified he delivered these to appellee's manager in the Fall of 1930, but the manager testified he received them on or about April 16, 1931 and sent them that day to his father, the president of appellee.

and on February 2, 1931 appellant received the requested letter
offer as follows: "I can only repeat what I wrote you in a recent
letter, and that is that \$25.00 per month is the lowest rental that
I can take for this property. *** The above stated rental of course
is for a limited period."

February 17, 1931, appellant answered as follows: "The offer
your consideration of the entire matter, and it is very reasonable,
especially when you have a building of this size to look after. We
would very much prefer to stay where we are, and I believe that
your cooperation, we can work out a program whereby we will still
be permitted in case business takes a little turn for the better.
The price of \$25.00 from March 15th will be quite a help to us, and
as we have now rented part of the space, which we do not need, we
think we can work out an expense program which will enable us to
show a little profit as business no more is holding up terribly
well for this time of the year and for the condition of the city."
Appellant then speaks of the former request to remove the rent for
fifteen days between March 15th and April 1st and then continues:
"We believe that we will just settle it out right there and make
it the greatest market that Woodford has ever had. If we get to
going good, we may ask for you to put some money in the bank
so that we might show our stock."

Appellant executed a lease in the instant, dated March 15, 1931,
for the term commencing March 15, 1931. The lease contained an
expiration date, but provided that it could be terminated by either
party giving the other sixty days notice. Appellant signed both of
them and gave them to Paul Gert, the manager of appellant, in Jackson.
Appellant testified he delivered these to appellant's manager in the
fall of 1930, but the manager testified he received them on or about
April 12, 1931 and sent them that day to the factory, the president
of appellant.

Subsequently appellant sent a statement to appellee covering rent from March 15th to May 15th at \$275.00 per month, or a total of \$550.00. On May 4, 1931, appellee sent their check for \$275.00 and marked it payment of rent from April 1st to May 1st, 1931. Appellant, on May 8th, 1931, returned this check for correction, stating in his letter: "I note you say this is rent from April first to May first: This is an error, as this pays rent from March 15th to April 15th." On May 18th, 1931, appellee notified appellant that they were vacating his premises and did so on or about June 1st, 1931.

From the conduct of the parties as shown by the evidence and from the foregoing correspondence, it is apparent that appellant did not desire to hold appellee as a tenant from year to year under the provisions of the original lease. It is also apparent that neither of the parties, for many months previous to March 15th, 1931 or on that date or at any time subsequent thereto had in mind the continuation of the original lease, either as to the amount of rent or for any definite specified length of time. Appellee, by the provisions of the lease, had the privilege of renewing the same for a three year period after March 14th, 1931. This option was never exercised. It is apparent that appellant expected appellee to pay the sum of \$275.00 per month rental after March 14, 1931. As evidence of this he sent a statement to appellee, requesting payment of \$550.00 for two months rent from March 15th to May 15th. As further evidence of his intention, appellant had a lease prepared which he executed and delivered to appellee, wherein the monthly rental was stipulated to be \$275.00 per month, beginning March 15, 1931. It is equally apparent that both parties intended that the arrangement obtaining after March 14th would be of a temporary character, and as evidence of this, the lease which appellant executed and delivered to appellee contained no expiration date, but expressly provided that it could be terminated by either

Subsequently, appellant sent a statement to appellee showing
rent from March 1st to May 1st at \$25.00 per month, and a check
of \$50.00. On May 4, 1931, appellee sent appellant a check for \$50.00
and marked it payment of rent from April 1st to May 1st, 1931.
Appellant, on May 6th, 1931, returned this check for deposit,
stating in his letter: "I hope you say this is rent from April
1st to May 1st. This is an error, as this was rent from
March 1st to April 1st. On May 1st, 1931, appellee notified
appellant that they were vacating his premises and did so on or
about June 1st, 1931.
From the content of the parties as shown by the evidence and
from the foregoing correspondence, it is apparent that appellee
did not desire to hold appellant as a tenant from year to year under
the provisions of the original lease. It is also apparent that
neither of the parties, for any matter previous to March 1st,
1931 or on that date or at any time subsequent thereto, had in mind
the continuation of the original lease, either as to the amount of
rent or for any definite specified length of time. Appellant, by
the provisions of the lease, had the privilege of renewing the
lease for a three year period after March 1st, 1931. This option
was never exercised. It is a general rule that appellant exercised no
right to pay the sum of \$25.00 per month rental after March 1st,
1931. As evidence of this he sent a statement to appellee, re-
questing payment of \$25.00 for two months rent from March 1st,
to May 1st. As further evidence of his intention, appellant sent
a lease prepared which he executed and delivered to appellee,
wherein the monthly rental was stipulated to be \$25.00 per month,
beginning March 1st, 1931. It is equally apparent that appellant
intended that the arrangement obtaining after March 1st, 1931, was
of a temporary character, and as evidence of this, the lease which
appellant executed and delivered to appellee contained no option
date, but expressly provided that it could be terminated by either

party, upon giving sixty days notice in writing.

There was no misunderstanding between the parties as to the amount the rent was to be after March 14, 1931. Upon this proposition the minds of the parties were in agreement, but there was clearly a misunderstanding as to whether any allowance was to be made for cleaning the floors and whitewashing the ceiling. A health officer had inspected the premises and demanded that this work be done. Appellee wrote appellant advising him of the inspection and what was required to be done. Appellant replied promptly, stating that so far as the cleaning was concerned, he thought it could be arranged to the mutual satisfaction of all. Later appellee again wrote in connection with that matter and stated its proposition, which was that after March 15th, its lease expired and that from March 15th to April 1st they would clean the building and get it in better shape, and for those fifteen days no rent would be paid, but the work would be done to suit them and for that work appellee would not expect appellant to pay therefor. Appellant promptly replied to this letter, stating that he would do what was reasonable toward helping clean up the building, but could not allow one-half month's rent without knowing what it was for. Appellee in its reply stated that they expected to clean and repair the main floor and white coat the ceiling in the main room. The evidence disclosed appellee did this work, or had it done between March 15th and April 1st, and expended therefor approximately \$150.00.

It is apparent that appellee expected the rent at \$275.00 to being April 1st. It is equally apparent that appellant expected appellee to pay rent at \$275.00 from March 15th. The immediate cause for appellee's removal was the return of appellee's check and the disallowance by appellant of the rent for one-half a month.

party, upon giving sixty days notice in writing.
There was no material standing between the parties as to the
amount the rent was to be \$125.00 per month, and the
position and lines of the parties were in dispute, and there was
clearly a misunderstanding as to what the rent was to be.
Made for cleaning the floor and whitewashing the ceiling. A
health officer had inspected the premises and found them to be
in good condition. Appellee wrote appellant advising him of the re-
sults of the inspection and that the premises were in good
condition and that the rent was to be \$125.00 per month.
Appellee, stating that as far as the cleaning was concerned, it
thought it could be arranged to the mutual satisfaction of all.
Later appellee wrote in connection with the same matter and
stated the proposition, which was that appellee would, the latter
agreed and that from March 1st to April 1st the rent was to be
\$125.00 per month, and that it was to be \$125.00 per month.
but it was to be \$125.00 per month, and the rent was to be
no rent would be paid, but the rent would be to be \$125.00 per
month that appellee would not expect appellee to be \$125.00 per
month. Appellee replied to this letter, stating that he would
do what was reasonable to give appellee a chance to move out, but
could not allow one-half month's rent without a receipt. It was
for. Appellee in its reply stated that it was expected to move out
within the next five or six days and that it was to be \$125.00 per
month. The evidence disclosed appellee did not move out, and that he
was in the premises from March 1st to April 1st, and remained there for
\$125.00 per month.
It is apparent that appellee remained in the premises for \$125.00 per
month from April 1st. It is appellee's contention that appellee
agreed to pay rent of \$125.00 per month from March 1st. The appellee
cause for appellee's removal was the failure of appellee to move out,
and the difference by agreement of the rent for one-half a month.

The minds of the parties never met. Appellant was unwilling to rent the premises for a year at the reduced rental. He did reduce the rent. He proffered to appellee a lease for the premises which provided for its termination upon sixty days notice. Appellee never accepted this proposal.

The law is well settled that where a tenant at the expiration of a lease remains on the premises without anything being said or done, the law presumes that the tenant thereby intended to renew his tenancy, but such a presumption is not conclusive, but is rebuttable, and proof that the holding over is referable to the pending of a treaty between the parties for a further lease or proof of a contrary intention on the part of the landlord alone, or on the part of both parties is sufficient to overthrow the implication that arises from the fact of remaining in possession. *Madlung v. Jackson*, 172 Ill. App. 60; *Clinton Wire Cloth Co. v. Gardner*, 99 Ill. 151; *Weber v. Powers*, 213 Ill. 370.

Appellant did not elect to hold appellee as tenant from year to year after March 14th, but did elect to treat him as a tenant at will after March 14th at a rental of \$275.00 per month. After a landlord has made such an election and the tenant moves out, the landlord should not be heard to say that he was holding the tenant on a year to year basis.

The judgment of the trial court is in accord with the Law
and evidence/^{and}is affirmed.

JUDGMENT AFFIRMED.

The words of the parties never met. Appellant was unwilling to rent the premises for a year at the rental of \$100.00. He did not agree to the rental of \$100.00 for the year which was provided for in the contract upon which the parties never agreed to the proposed.

The law is well settled that where a tenant of the premises or a lease is made on the premises without anything being said or done, the law presumes that the tenant intended to occupy the premises, but such a presumption is not conclusive, but is rebuttable, and proof that the holding over is attributable to the parties of a treaty between the parties for a future lease or proof of a contrary intention on the part of the landlord is sufficient to overcome the presumption that arises from the fact of holding over in possession. *Madison v. Jackson*, 175 Ill. App. 3d; *Union the State Co. v. Gardner*, 93 Ill. 101; *Wood v. Wood*, 115 Ill. 371.

Appellant did not elect to hold the premises as tenant from year to year after March 1st, but did elect to treat his lease as terminated at will after March 1st at a rental of \$100.00 per month. After a landlord has made an election and the tenant moves out, the landlord should not be held to say that he was holding the tenant on a year to year basis.

The judgment of the trial court is in accord with the law and is affirmed.
JUDGE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT }ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 635²

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933

IDA C. ERMOLD,

Appellant

vs.

H. CLAYTON BEAR,

Appellee.

APPEAL FROM THE JUDICIAL
COURT OF STEPHENSON COUNTY.

DOVE-J.

About March 1, 1922 appellee, H. Clayton Bear, purchased a homestead in the Village of Orangeville for the sum of \$3,500.00. Of the purchase price appellee paid \$1,500.00 in cash and borrowed from his father-in-law, Jerit Wohlford, the sum of \$2,000.00, and as evidence of this indebtedness, appellee, on March 2, 1922, executed and delivered to Jerit Wohlford his promissory note, payable to the order of Jerit Wohlford one year after date, and bearing 5% interest per annum. The title to the premises was conveyed to appellee and he and his wife, Emma E. Bear, occupied the same as their homestead until her death on December 8, 1929. In 1933 Jerit Wohlford died and the appellant, Ida C. Ermold and her brother were duly appointed and qualified as his executors, and in the course of the settlement of his estate endorsed and delivered this note to their sister Emma E. Bear, daughter of Jerit Wohlford, as a part of her distributive share.

Upon the death of Emma E. Bear, her husband, appellee herein, and her sister, appellant herein, qualified as joint executors of her will, and appellant filed an inventory in the County

Court, which contained the following, among other items: "Note, Clate Bear 3/2/22 5%, \$2000.00". The next day appellee filed an inventory which failed to contain that item, and thereupon appellant filed objections to appellee's inventory, and upon a hearing in the County Court, appellant's objections to the inventory of appellee were stricken from the files. From that order, appellant prayed for and perfected an appeal to the Circuit Court, but this appeal was later dismissed upon her motion.

Appellant then instituted this suit in the Circuit Court against her co-executor under paragraph 121, Chap. 3, Cahill's Illinois Statutes. The original bill alleged the execution of the said \$2000.00 note by appellee to Jerit Wohlford, his death, the receipt thereof by Emma E. Bear as distributee under her father's will, and her death and the appointment of appellant and appellee as joint executors of her last Will and Testament. The bill then charged that after the death of Emma E. Bear, appellee, having access to her property, did unlawfully secure possession of this note and destroyed the same, with the intention of destroying all evidence of indebtedness from himself to said estate, and that appellee refused to join with her in filing a proper inventory showing this indebtedness from him to the estate of which they were executors. To this bill, appellee filed his answer, and the cause was referred to the Master, and after the evidence was taken, an amended bill was filed which omitted to charge that appellee had destroyed the note, but after alleging that this note was not found among the property or effects of Emma E. Bear, deceased, it averred that appellee had neglected and refused to inventory the same, although Emma E. Bear, within the last few years of her life, believed that said indebtedness evidenced by said note was due her from appellee.

Appellee, in his answer, admitted that he executed the note which forms the basis of this litigation, admits the death of Jerit Wohlford and the settlement of his estate, and that his wife,

overed for and ported on board to the vessel, and the
apples were taken from the vessel. When the vessel
the Grand Court, appellant's affidavit in the support of
filed objections to appellant's affidavit, and that a hearing on
appellant's motion failed to establish that the appellant's motion
these facts were not in dispute. The court was satisfied that an
error, which constituted an error, and that the appellant's motion
should be later dismissed with prejudice.

[illegible]

...in the answer, admitted that he executed the ...
...and basis of this information, advise the ...
...the ...

Emma E. Bear, became the owner of the note in 1924, avers that said note was thereafter canceled by Emma E. Bear in her lifetime, and alleges that the payment thereof was forgiven by her as an indebtedness of this defendant. His answer then avers that said note was not a part of the property or estate of his wife, and denies that he destroyed it before or after her death. The answer then sets up the proceedings in the County Court and avers that the identical issues presented in this proceeding were determined adversely to appellant in the County Court, and alleges that she is therefore estopped from obtaining the relief sought in this proceeding.

It is the contention of appellant that under the averments of her amended bill and the admission of the appellee in his answer to the effect that he executed this note and that his wife received it as a portion of her distributive share in her father's estate in November 1924, and that thereafter she died in December 1929, the existence of the relationship of debtor and creditor between appellee and his wife at the time of her death is thereby established and the burden of maintaining his defense, that this note had been canceled and its payment forgiven by Emma E. Bear in her lifetime, rested upon appellee.

In her original bill appellant charged the unlawful destruction of this note by appellee after the death of his wife, with the intention of destroying all evidence of indebtedness from himself to her estate. This allegation was not proven, nor was there any attempt made to prove it. The amended bill charged that within the last few years of her life, Emma E. Bear believed that said indebtedness evidenced by this note was due her, but there was no competent evidence to substantiate this averment. The answer avers that the note was not inventoried by appellee because it was not a part of her estate, having been canceled in 1924 by Emma E. Bear and that payment thereof, as an indebtedness against him was forgiven. In our opinion, under the issues as presented by the pleadings, it

was necessary for appellant to prove that at the time of the death of Emma E. Bear, an indebtedness existed from appellee to her.

If, however, from the fact that appellee executed this note in 1922 and it being conceded that it came into the possession of his wife in 1924, the presumption obtains that his obligation thereon is a continuing one and the burden to show its cancellation and discharge is cast upon appellee then we believe that, under the evidence, this presumption has been overcome.

It appears from the evidence that Emma E. Bear, at the time of her death and for many years prior thereto, had a safety deposit box at the Second National Bank of Freeport, where she kept her papers; that she had been a customer of that bank for several years, and no one had access to her safety box after her death until the inventory was made on December 30, 1929 and sent to the Attorney General. This Safety box contained a government bond of the par value of \$500.00, a certificate of deposit for \$250.00, a note and trust deed for \$400.00, and another note for \$2500.00, all the property of Mrs. Bear. No note executed by appellee was found therein, but an unsigned note and an unexecuted agreement were taken therefrom, and these are as follows, viz:

"\$2,000.00

April 7th, 1925.

Five Years - - - after date, for value received I promise to pay to the order of Emma E. Bear TWO THOUSAND (\$2000.00) - - - DOLLARS at Orangeville, Illinois with interest at the rate of five per cent, per annum, after maturity - - - payable annually.

No. ----- Due-----"

" Whereas H. C. Bear and Emma E. Bear his wife, who reside in a home in the Village of Orangeville, County Stephenson and State of Illinois, which home consists of a house and lots upon which such house is located, and whereas the title to said residence and lots is in the said H. C. Bear, and whereas the sum of \$2,000.00, money belonging to the said Emma E. Bear, is invested in said house and lot:

Now therefore, these presents is being made and signed by the said H. C. Bear and the said Emma E. Bear to show and establish the fact that \$2,000.00 of the value of said house and lot belongs to and is the property of the said Emma E. Bear, and the said H. C. Bear hereby acknowledges that the sum of \$2,000.00 is due and owing the said Emma E. Bear out of and from said premises.

and membership for applicant to cover half of the dues to the bank of

It is, however, from the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee, that the Commission is unable to determine whether or not the Committee is still active. The Commission is, therefore, unable to determine whether or not the Committee is still active.

It appears from the evidence that on or about the 1st day of January, 1934, the defendant, who was then residing at the above address, was in the city of New York, and was in the company of a woman known to the defendant as "Alice". The defendant and "Alice" were in the city of New York for the purpose of obtaining a passport for "Alice". The defendant and "Alice" were in the city of New York for the purpose of obtaining a passport for "Alice". The defendant and "Alice" were in the city of New York for the purpose of obtaining a passport for "Alice".

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the Committee for the Liberation of the People of the East (CLPE) in the United States. This is a serious matter, as the CLPE is a known and active organization which has been operating in the United States for many years. It is a member of the National Front for the Liberation of China (NFLC) and has been active in recruiting and training Chinese agents for operations in the United States. The Commission is therefore very concerned that the Government of the United States is not providing it with the information it needs to carry out its duties. It is therefore requesting the Government of the United States to provide the Commission with the information it needs as soon as possible.

[illegible]

In Witness whereof the said M. C. Bear and Emma E. Bear hereunto set their hands and seals this 7th day of April A. D. 1925.

------(SEAL).

------(SEAL)."

The pleadings and evidence further disclose that the indebtedness which appellant seeks to have appellee account for in this proceeding was, at its inception, evidenced by a written instrument: that the money which this instrument evidenced was used by appellee to purchase a home in which he and his wife lived until the time of her death: that this written instrument came into Emma E. Bear's hands in 1924: that no payment has ever been made thereon since that time: that her valuable papers, notes, obligations and bonds were kept in her safety deposit box; that no one other than Mrs. Bear had access to this safety deposit box and that at the time of her death this written instrument was not in that box and has never been found. All this is sufficient to overcome the presumption relied upon by appellant and warranted a dismissal of the bill for want of equity. A "presumption is not evidence and can not be treated as evidence. It cannot be weighed in the scale against evidence. Presumptions are never indulged in against established facts. They are indulged in only to supply the place of facts. As soon as evidence is produced which is contrary to the presumption which arose before the contrary proof was offered, the presumption vanished entirely". *Weger v. Robinson Nash Motor Co.*, 340 Ill. 81.

In the view we have taken of this case, it is unnecessary to consider the questions of res adjudicata or estoppel. It will be noted, however, that the county court, in its order striking the objections of appellant to the inventory filed by appellee from the files, did not find either inventory, the one filed by appellant or the one filed by appellee, to be correct, nor did it approve either. The only order the county court made was to sustain a motion to strike. The result was that both inventories

1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
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7. seventh of these is the fact that the
8. eighth of these is the fact that the
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10. tenth of these is the fact that the

1000

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

THE DISTRICT COURT, DISTRICT OF COLUMBIA, in and for the District of Columbia, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears in the files and records of the Court.

It is the view of the Board of Directors, as expressed in the minutes of the meeting of the 11th day of March, 1914, that the Board of Directors of the National Bank of Commerce, New York, is authorized to issue the following resolution:

were before it for approval or disapproval, but before any action thereon was taken in the county court, the present suit was instituted.

In our opinion the decree of the Circuit Court of Stephenson County dismissing the bill for want of equity is sustained by the evidence and should be affirmed.

DECREE AFFIRMED.

There is a small, dark, rectangular object, possibly a piece of wood or metal, lying on the ground. It is oriented horizontally and appears to be a component of a larger structure, possibly a door or a window frame. The object is dark in color, possibly black or dark brown, and has a rough, textured surface. It is positioned in the lower right corner of the frame, near the edge of the ground. The background is a light, sandy or dusty surface, possibly a beach or a dry, open area. The overall scene is somewhat desolate and appears to be a close-up shot of a small, isolated object in a natural setting.

It is further stated that the above mentioned information was obtained from the files of the FBI and was not obtained from any other source.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 685³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, A. D. 1933.

MARIE A. BLOOM,

Appellee

vs.

APPEAL FROM COUNTY COURT

PEORIA COUNTY

N. M. GILLETTE and
E. M. JOHNSON,

Appellants

DOVE-J.

On June 17, 1931, appellee leased to appellants, for a term of one year, certain premises in the City of Peoria, at a stipulated rental. Default having been made in the payment of the rent, this suit was instituted, resulting in a judgment in favor of appellee and against appellants for Seven Hundred Twenty-one and 90/100 Dollars (\$721.90), to reverse which, this appeal has been perfected.

The basis of the suit is a written lease, under seal, executed by appellee, as party of the first part, and appellants as party of the second part, in which appellants are designated as lessees. Upon the hearing, which was before the court, a jury having been waived, evidence was introduced and heard subject to the objection, of a conversation between the agent of appellee and appellants, in which the agent of appellee told Mr. Gillette, one of the appellants, that he would not let him have

the building alone, whereupon Mr. Gillette asked him if it would be satisfactory if Mr. Johnson, the other appellant, would execute the lease and guarantee the payments of the rent, and being assured by the agent of appellee that such a lease would be acceptable, the lease was thereafter executed. Evidence was also offered to the effect that after the lease was executed, appellee accepted for three months of the period covered by the lease \$50.00 less each month than the stipulated monthly rental.

It is the contention of the appellants that this parol evidence was admissible to show that Gillette was in fact the lessee of the premises, that Johnson was guarantor only and could not be joined with Gillette in this suit, and that the reduction of the rent by appellee was without the knowledge and consent of Johnson and that such a change in the provisions of the lease operated to release him from liability.

We have examined all the cases cited by appellants and find that they involve either negotiable instruments or are cases wherein suits were brought for contribution by some of the makers of a note against others whose names appeared thereon as makers. It is the law and the cases relied upon by appellants hold that the makers of a negotiable instrument can sue each other and prove collateral agreements determining the liability as between themselves and the parol evidence rule restricting the varying of the terms of a written instrument is not applicable to negotiable instruments. This, however, is a suit by a lessor against her lessees upon an executed, sealed, written instrument, and the cases relied upon by appellants are not in point.

It is elementary that parol evidence, to vary the terms of a written lease, is inadmissible. "Evidence proffered of conversations between plaintiffs and their agent and defendant at and prior to the execution of the lease was inadmissible. The

the building alone, whereas Mr. Gilllett had the right to use

the building for his business, the other building, which

was the lease and guaranteed the payment of the rent, and

being assured by the agent of a building that was a leasehold

and acceptable, the lease was then accepted. The lease was

also offered to the effect that after the lease was accepted,

the lease was accepted for a leasehold of the building owned by the

lease \$50.00 less each month than the amount of the monthly rental.

It is the contention of the appellants that this rental evidence

was admissible to show that Gilllett was in fact the lessor of

the premises, that Johnson was a tenant or agent and could not be

joined with Gilllett in this suit, and that the formation of the

rent by appellee was without the knowledge and consent of Johnson

and that such a change in the provision of the lease created

to release him from liability.

We have examined all the cases cited by appellants and find

that they involve either negotiable instruments or are cases

where the suits are brought for contribution by some of the parties

of a note and not others whose names appeared thereon as sureties.

It is the law and the cases relied upon by appellants that when the

terms of a negotiable instrument can be each other and have

collateral agreements concerning the liability in relation thereto

and the oral evidence rule restricting the admission of

the terms of a written instrument is not applicable to negotiable

instruments. This, however, is a well settled principle of law

and leases upon an executed, sealed, written instrument, and the

cases relied upon by appellants are not in point.

It is also contrary to oral evidence, to say that the terms of

a written lease, is inadmissible. "Evidence prohibited of con-

versations between plaintiffs and their agent and defendant as

and prior to the execution of the lease was inadmissible. The

written contract can not be varied, altered, changed or amended by such conversations. The instrument itself constitutes the contract of the parties. *Gaston v. Gordon*, 208 Mass. 265". *Hoefeld v. Ozello*, 213 Ill. App. 152.

The testimony of what was said in the conversations prior to the execution of the lease being inadmissible, there is nothing to sustain the contention that Johnson was a guarantor only and that the terms of the lease having been changed without his knowledge and consent he was released from liability thereunder. The change complained of by the appellants was a reduction of the rent for \$175.00 per month to \$125.00 per month. In *Goldsborough v. Gable*, 140 Ill. 269, it appeared that the lessor orally agreed to reduce the rent under a written lease from \$70.00 or \$50.00 per month, and in referring to such an agreement, the court said:

"Appellee, by that agreement, is required to do nothing which he was not already obligated to do as tenant from year to year, and appellant's duties are in nowise lessened or changed thereby. It simply purports to obligate appellee to pay and appellant to receive \$50.00, where they were already obligated, the one to pay and the other to receive \$70.00. There is, thereby, neither in fact nor in presumption of law, injury or loss to appellee, or gain or benefit to appellant. It follows that it is an agreement, as clearly as one can be, without any consideration to support it, a mere nudum pactum, and so it is binding upon neither of the parties, and it is unsusceptible of being enforced in this suit." See also *Chapman v. McGrew*, 20 Ill. 101.

In our opinion the written lease constituted the contract of the parties to this litigation and the testimony objected to was clearly incompetent and the trial court rendered the only judgment that could be rendered consistent with the law and the undisputed facts as they appear in this record. The judgment of the County Court of Peoria County is affirmed.

within contract can not be varied, altered, changed or modified
by any contract. The parties to the contract are the
trust of the parties. *Winton v. Gordon*, 108 Mass. 455. 1869-70
v. Guelio, 913 Ill. App. 15.

The testimony of that was said in the contract was that
to the extension of the lease and the land, there is a right
and to extend the contract that Johnson was a resident of the
and that the terms of the lease were not to be changed out of its
immediate and cannot be varied from its original intention.
The change made by the parties was a reduction of the
rent from \$175.00 per month to \$125.00 per month. In *Winton v. Gordon*
v. Guelio, 140 Ill. 435, it appeared that the parties were
to reduce the rent under a written lease from \$175.00 to \$125.00
per month, and in reference to each of the parties, the court said:

"Appellee, by that agreement, is bound to do
which he was not already obligated to do as to the rent from year to
year, and appellee's notice was in no wise altered or changed
thereby. It simply purports to obligate appellee to pay and ap-
pelant to receive \$125.00, where they were already obligated, he
and the other to receive \$175.00. There is, thereby,
delivered in fact and in production of law, nothing or less in
appellee, or his or benefit or appellee. It follows that it is
an agreement, as clearly as one can be, without any consideration
to support it, a mere naked promise, and so it is binding upon
neither of the parties, and it is inadmissible of being enforced
in this suit. See also *Johnson v. Johnson*, 100 Ill. 401.

In our opinion the written lease as stated the contract of
the parties to this litigation and the testimony of the parties
clearly indicates and the trial court rendered the only judgment
that could be rendered consistent with the law and the facts of the
case as they appear in this record. The judgment of the County Court of
Wanda County is affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 635⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 18 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

PETER HEIDENRIECH,

Appellee,

v.

J. J. MOFFETT,

Appellant.

Appeal from the Circuit

Court of Henry County.

DOVE-J.

On the morning of October 12th, 1930, the appellant, Dr. J.J. Moffet, while driving his automobile in an easterly direction upon State Route No. 7 between the cities of DePue and Spring Valley, overtook appellee who was walking upon said highway in an easterly direction, and struck him with the right fender of his car, throwing him to the side of the road and causing him to be seriously and permanently injured.

Shortly after the accident, appellant notified the Illinois Agricultural Mutual Insurance Company of Chicago, in which he carried insurance, and on October 24, 1930, Frank Billings, an adjuster for the Insurance Company, called upon appellee, who was then in a hospital, for the purpose of settling appellant's liability for the injuries appellee had sustained, and Mr. Billings did, at that time, procure a release signed by appellee. Thereafter this action was instituted by appellee to recover for the injuries he sustained. His declaration consisted of four counts, to which appellant filed the general issue and a special plea which set up the release obtained on October 24, 1930. The sufficiency of the pleadings is not questioned, and according to counsel for appellant, the only

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, 1931

THE PEOPLE OF THE STATE OF ILLINOIS,

Appellee,

vs.

JOHN J. CONNELLEY,

Appellant.

DOVE-1

On the morning of October 24, 1930, the appellant, Dr. J. J. Connelley, while driving his automobile in an easterly direction upon State Route No. 7 between the cities of Deane and Spring Valley, overtook appellee who was walking upon said highway in an easterly direction, and struck him with the right fender of his car, throwing him to the side of the road and causing him to be seriously and permanently injured.

Shortly after the accident, appellant notified the Illinois Agricultural Mutual Insurance Company of Chicago, in which he carried insurance, and on October 24, 1930, Frank Gillman, an adjuster for the Insurance Company, called upon appellee, who was then in a hospital, for the purpose of settling appellant's liability for the injuries appellee had sustained, and Mr. Gillman did, at that time, procure a release signed by appellee. Thereafter this release was instigated by appellee to recover for the injuries he sustained. His declaration consisted of four counts, to which appellee filed the General Issue and a special plea which set on the release obtained on October 24, 1930. The affidavit of the plaintiff is not questioned, and according to counsel for appellant, the only

question involved for determination upon this appeal is the validity of the release and discharge which appellee signed on October 24, 1930.

The evidence discloses that appellee is a Hollander thirty-three years of age, and had arrived in this country from his native land not a great while before the accident. He was a common laborer and received for his work comparatively small wages. At the time the release was executed, appellee was in the hospital, in bed, in a semi-reclining position, and according to the testimony of appellee, he was suffering considerable pain, was not able to read or write the English language, only imperfectly understood it, did not know he was executing a release and does not recall what really transpired.

According to the testimony of Mr. Billings, he, Billings, told appellee that he came for the purpose of interviewing him about the accident, that it was a case of questionable liability, and that appellant was willing to take care of part of the doctor bill and hospital bill and some little expense to him personally. Appellee replied that he wanted all of the expense taken care of, whereupon Billings left the room and returned and informed appellee that he had given the hospital a check and obtained from them a release, had paid the doctor bill and had obtained from the hospital and doctor a guarantee to furnish appellee medical and hospital services until appellee had fully recovered from his injuries. Appellee then said that was all right, but he ought to have something for himself, as he was getting twenty cents an hour and was working every day and was receiving about \$14.00 or \$15.00 per week. Mr. Billings then offered him \$25.00, which appellee refused to accept, but finally said he would be satisfied with \$40.00, and while Billings held his brief case as a support for the release, appellee, with considerable difficulty, signed the release which was placed thereon with his left hand and received an order for \$40.00. This order was never presented for payment but was tendered appellant by appellee upon the trial. Mr. Billings further testified that he knew appellee had

question in order for determination upon this point is the validity of the release and discharge which appellee obtained on October 25, 1935. The evidence discloses that appellee is a Hollander thirty-three years of age, and had arrived in this country from his native land not a great while before the accident. He was a common laborer and received for his work correspondingly small wages. At the time the release was executed, appellee was in the hospital, in bed, in a semi-reclining position, and according to the testimony of appellee, he was suffering considerable pain, was not able to read or write the English language, only imperfectly understood it, did not know he was executing a release and does not recall that he fully understood. According to the testimony of Dr. Williams, Dr. Williams, told appellee that he came for the purpose of interviewing him about the accident, that it was a case of questionable liability, and that appellee was willing to take care of part of the doctor bill and hospital bill and some little expense to him personally. Appellee replied that he wanted all of the expense taken care of, whereupon Williams left the room and returned and informed appellee that he had given the hospital a check and obtained from them a release, and had paid the doctor bill and had obtained from the hospital the doctor's guarantee to furnish appellee medical and hospital services until appellee had fully recovered from his injuries. Appellee then said that was all right, but he ought to have something for himself, so he was getting twenty cents an hour and was working every day and was receiving about \$11.00 or \$12.00 per week. Dr. Williams then offered him \$25.00, which appellee refused to accept, but Williams said he would be satisfied with \$5.00, and while Williams paid him \$5.00 as a payment for the release, appellee, with considerable difficulty, signed the release which was offered to him and he never left hand and received an order for \$5.00. This order was never presented for payment but was tendered appellee by Williams upon the trial. Dr. Williams further testified that he knew appellee had

a serious arm injury and was suffering considerable pain; that his right arm was in a cast and strapped to his body; that he was of foreign birth and "wasn't able to talk our language except in a broken way." That from his conversation, "I assumed he didn't have a penny in the world, but I had no interest in him. He was just another claim and I dealt with him just as a number in my book." In addition to the order for \$40.00, which he gave appellee, Mr. Billings also gave the physician \$100.00 and paid the hospital another \$100.00.

The signature of appellee to the release was witnessed by Sam Stenbeck and William Boland, Jr. Mr. Stenbeck testified and corroborated Mr. Billings in his version as to what transpired when the release was procured, and he says that at that time appellee was suffering pain, but that they talked about the release and he, Stenbeck, advised appellee not to sign it. Mr. Bolard did not testify, nor was his absence accounted for, and none of the sisters or nurses at the hospital were called as witnesses. Dr. Moran, the attending physician, was only in the room where Billings and appellee were discussing a settlement for a few minutes, not more than three, and Dr. Moran does not testify that appellee said anything while he was present, but he does say that he heard Mr. Billings talking and that appellee appeared normal.

Upon a consideration of the foregoing evidence, the jury returned a verdict in favor of appellee for \$1750.00, which was approved by the trial court, who rendered judgment thereon, after overruling a motion for a new trial, and the record comes to this court for review by appeal.

It is conceded that appellee sustained serious injuries. His nose was broken. He had a compound, comminuted fracture of the right arm and a dislocated elbow joint. He had bruises, contusions

Mr. Billings also gave the physician \$100.00 and said the doctor
"In addition to the order for \$40.00, which was for the
just another clinic and I said with him that he was to pay
have a penny in the box, but I had no interest in it. He was
in a broken way." "That from his conversation, I learned he didn't
was of foreign birth and wasn't able to tell me anything except
his life and was a great and returned to his job; that he
a unique and highly and was a very interesting person; that

The signatures of appellees to the release was witnessed by Ed Stenbeck and William Holman, Jr. Mr. Stenbeck testified that he incorporated Mr. Billings in his version as to what he recalled when the release was procured, and he says that at that time appellee was either asleep, and that they talked about the release and he, Stenbeck, advised appellee not to sign it. Holman did not testify, nor was his name associated with, and none of the doctors or nurses at the hospital were called as witnesses. Dr. Norman, the attending physician, was only in the room where Billings and appellee were discussing a settlement for a few minutes, not more than three, and he does not testify that appellee said anything while he was present, but he does say that he heard Mr. Billings talking and that appellee agreed not to.

count for review by court.

It is considered that the following information is of interest to the Committee and is being provided for their information.

and abrasions on his arms, legs and body. His right arm, for some time, was so swollen that it was twice its normal size. Slight infection developed and after the swelling was reduced, the arm was placed in a cast and strapped to his body. X-ray pictures were taken and the physician was obliged for some time after the accident to attend him several times daily. He suffered considerable pain and opiate injections were administered frequently. The attending physician testified that appellee remained in the hospital for several months and that when he left, his right arm was saved, but that there was an absolute ankylosis of the elbow joint.

It is further conceded that appellant was guilty of negligence and no complaint is made of the amount of the verdict, and it is not insisted that there was any error committed by the trial court in the admission or rejection of evidence or in the instructions which were given the jury. Appellant insists, however, that the testimony of appellee concerning his inability to understand the release, his testimony concerning the pain and suffering and his version of what transpired when the release was executed are all unworthy of belief: that the credible evidence establishes that the release was obtained fairly and honestly, for a valuable consideration and was executed by appellee of his own free will, with a full and complete knowledge of its nature, purport and effect.

Only eleven days had intervened from the time of the accident and the day the release was executed. At that time no one could foresee the seriousness of the injury which appellee had sustained. His right arm was in a cast strapped to his body. His other injuries had not fully healed. He was in the hospital, confined to his bed, suffering pain. He was unadvised and unassisted. He was illiterate, could not read or write the language in which the release was written and his understanding of English was imperfect. We have examined the

and abrasions on his arms, legs and body. The victim was taken to the hospital and after the swelling was reduced, slight infection developed and after the swelling was reduced, the arm was placed in a cast and strapped to the body. X-ray pictures were taken and the physician was obliged for some time after the accident to attend him several times daily. He administered considerable pain and opiate injections were administered. The attending physician testified that swelling occurred in the hospital for several months and that after he left, the right arm was saved, but that there was an absolute ankylosis of the elbow joint.

It is further conceded that appellant was guilty of negligence and no complaint is made of the amount of the verdict, and it is not insisted that there was any error committed by the trial court in the admission or rejection of evidence or in the instructions which were given the jury. Appellant insists, however, that the testimony of appellee concerning his inability to understand the release, his testimony concerning the pain and suffering and his version of what transpired when the release was executed and his anarchy of belief; that the credible evidence established that the release was obtained fairly and honestly, for a valuable consideration and was executed by appellee at his own free will, and a full and complete knowledge of its nature, amount and effect. Only eleven days had intervened from the time of the execution and the day the release was executed. At that time no one could foresee the consequences of the injury which appellee had sustained. His right arm was in a cast strapped to his body. His right arm had not fully healed. He was in the hospital, confined to his bed, suffering pain. He was weakened and debilitated. He was illiterate and could not read or write the language in which the release was written and his understanding of English was imperfect. He had received the

transcript of the testimony as the same appears in the record, as well as the abstract. Mr. Billings and Mr. Stenbeck's testimony discloses Mr. Billings did most of the talking and that appellee talked very little. The release was procured hastily and the consideration was so grossly inadequate as to indicate lack of understanding on the part of appellee. The jury arrived at the conclusion that appellee must not have understood and appreciated the nature of the release and the serious consequences entailed by its execution, and we have no disposition to say their findings are unsupported by the weight of the evidence.

Whether this release was fairly and honestly obtained from appellee was a question of fact to be determined by the jury. If it was, appellee cannot be heard to say he could not read or understand it, but is bound by the settlement. If, however, by reason of opiates or pain, appellee was in such physical condition that he did not understand the nature of the instrument presented to him or if his state of mind was such that he acted without deliberation and without understanding the real subject matter of the release and if the parties were not on an equal footing and the adjuster affected an unfair settlement, then the instrument is void and does not bind appellee. *Chicago Union Traction Co. v. Ludlow*, 108 Ill. App. 357; *Reitz v. Yellow Cab Co.* 248 Ill. App. 287. Whether the parties were on an equal footing and whether the amount for which a claim is alleged to have been settled is adequate are always circumstances material to the inquiry. *Featherstone v. Betlejewski*, 75 Ill. App. 59.

In this case the jury saw and heard the witnesses and it was their duty to decide, under proper instructions from the court, the issues involved. Their advantages to determine the truth were superior to ours, and we cannot say that their verdict is manifestly against the weight of the evidence. The trial court approved the verdict and rendered judgment thereon, and that judgment, in our opinion, should be affirmed.

Judgment Affirmed.

transcript of the testimony as the same appears in the record, as well as the affidavit. Mr. Williams and Mr. Williams's testimony, disavowed Mr. Williams's own account of the killing and that he was talked very little. The trial was proceeding rapidly and the consideration was so grossly inadequate as to indicate lack of understanding on the part of the jury. The jury arrived at the conclusion that appellee must not have understood and appreciated the nature of the release and the various consequences entailed by its execution, and we have no disposition to say their findings are unsupported by the weight of the evidence.

Whether this release was fairly and honestly obtained from appellee was a question of fact to be determined by the jury. If it was, appellee cannot be heard to say he could not read or understand it, but is bound by the affidavit. If, however, by reason of ignorance or fear, appellee was in such physical condition that he did not understand the nature of the instrument presented to him or if his state of mind was such that he acted without reflection and without understanding the real subject matter of the release and if the parties were not on an equal footing and the subject affected an unfair element, then the instrument is void and does not bind appellee. *Chicago Union Traction Co. v. Miller*, 103 Ill. App. 387; *Reitz v. Yellow Cab Co.*, 85 Ill. App. 387. Whether the parties were on an equal footing and whether the amount for which a claim is alleged to have been settled is adequate are always circumstances material to the inquiry. *Peckarsone v. Testaferris*, 75 Ill. App. 25.

In this case the jury saw and heard the witnesses and it was their duty to decide, under proper instruction from the court, the issues involved. Their findings as to whether the parties were on an equal footing and whether the amount for which a claim is alleged to have been settled is adequate are conclusively binding on the right of the executor. The trial court approved the verdict, and we cannot say that there is any error in its opinion, and we should affirm it.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 635⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:



In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

Paul C. Nicholson, Administrator
of the Estate of Onetta Nicholson,
deceased,

Appellant

Appeal from the Circuit Court

vs.

of Stark County

Noah W. Winn, et al,

Appellees.

DOVE-J.

This is an appeal from a decree of the Circuit Court of Stark County, dismissing for want of equity, a bill filed for the purpose of setting aside a deed executed March 14, 1931 by Noah W. Winn, conveying eighty acres of land to his two sons, Fred G. Winn and Elmer A. Winn.

The suit was instituted by Onetta Nicholson, who died after the evidence was taken, but before the Master in Chancery had made his report. Thereafter Paul Nicholson, Administrator of her estate was substituted as complainant. The bill alleged that complainant, on July 25, 1931 recovered a judgment against Noah Winn, Mark L. Winn and Bessie Winn for \$2980.51; that previous to the rendition of said judgment, and at the time the indebtedness accrued, Noah Winn was the owner of said eighty acres of land, but made a pretended conveyance thereof on March 14, 1931 to his two sons Elmer A. Winn and Fred G. Winn; that said conveyance was not real, but a mere sham, made with the intention of defrauding complainant and other creditors, that no consideration was paid therefor and that Noah Winn was possessed of no property other than the eighty acres so fraudulently conveyed. The bill

In the Appellate Court of Illinois

Second District

October Term, A.D. 1933

Paul C. Nicholson, Administrator,
of the Estate of Gustaf Nicholson,
deceased,

Appellant
vs.
Hosh G. Finn, et al.,
Appellees.

DOVER-1.

This is an appeal from a decree of the Circuit Court of Stark County, Illinois, granting for want of equity, a bill filed for the purpose of setting aside a deed executed March 14, 1931 by Hosh G. Finn, conveying eighty acres of land to his sons, Fred G. Finn and Elmer L. Finn.

The suit was instituted by Gustaf Nicholson, who died after the evidence was taken, but before the hearing in Chancery had made his report. Afterward Paul Nicholson, Administrator of her estate was substituted as complainant. The bill filed for the purpose of setting aside a deed executed March 14, 1931 recovered a judgment against Hosh Finn, Mark L. Finn and Elmer L. Finn for \$2800.00; that judgment is the rendition of said judgment, and at the time the same was rendered, Hosh Finn was the owner of said eighty acres of land, and made a pretended conveyance thereof on March 14, 1931 to his two sons, Fred G. Finn and Elmer L. Finn; that said pretended conveyance was not real, but a mere sham, made with the intention of defrauding complainant and other creditors, that no consideration was paid therefor and that Hosh Finn was possessed of no property other than the eighty acres so fraudulently conveyed. The bill

made the said Noah Winn, Elmer A. Winn and Fred G. Winn defendants, and required from each of them an answer under oath. The required answers and replications thereto having been filed, the cause was heard by a Special Master, who reported the testimony and conclusions and recommended that the bill be dismissed. Exceptions to his report having been overruled by the Chancellor, a decree was rendered dismissing the bill for want of equity, and this appeal followed.

From the sworn answer of the defendants, it appears that Elmer A. Winn and Fred G. Winn are sons of Noah Winn, and in 1909 were living at home with their father ^{and} mother; that at that time they entered into a contract with their father, by the terms of which the father was to buy the farm, upon which they were then living as tenants; that Fred and Elmer were to stay at home with their father and mother until the farm was paid for, and at that time the father would deed the farm to them; that in pursuance to this agreement Noah W. Winn purchased, on October 16, 1909, the land for Nine Thousand Dollars; that three thousand dollars of the purchase price was accumulated by the joint efforts of himself and sons, and that amount was paid at the time the deed was made, and the balance was evidenced by two notes, one for one thousand dollars and one for five thousand dollars, secured by two trust deeds; that the one thousand dollar note became due February 28, 1911 and was paid February 6, 1911; that the five thousand dollar note became due February 28, 1920 and was paid March 4, 1920; that Fred and Elmer fully complied with their agreement with their father in every particular, and remained at home and in pursuance of the agreement the father did, on March 14, 1931, execute to them the deed sought to be set aside in this proceeding.

Appellant insists that this conveyance is void as to

the said Josh Lin, James A. Lin and Fred A. Lin, and
and required from each of them an answer under oath. The
replied answers and explanations thereto are in the record, and
same was heard by a special master, who reported the following
and conclusions and recommended that the bill be dismissed. The
questions to his report having been overruled by the court, and
a decree was rendered dismissing the bill for want of equity,
and this appeal followed.

From the sworn answer of the defendants, it appears that
James A. Lin and Fred A. Lin are sons of Josh Lin, and in
1909 were living at home with their father, and at
that time they entered into a contract with their father, by
the terms of which the father was to buy the farm, and when
they were then living as tenants; that Fred and Josh were to
stay at home with their father and mother until the farm was
paid for, and at that time the father would deed the farm to
them; that in pursuance to this agreement Josh A. Lin pur-
chased, on October 18, 1909, the land for nine thousand dollars;
that three thousand dollars of the purchase price was furnished
by the joint efforts of himself and Josh, and that amount
was paid at the time the deed was made, and the balance was
furnished by two notes, one for one thousand dollars and one
for five thousand dollars, secured by two trust deeds; that
the one thousand dollar note became due February 22, 1911, and
was paid February 8, 1911; that the five thousand dollar note
became due February 22, 1920 and was paid March 4, 1921; that
Fred and Josh fully complied with their agreement with their
father in every particular, and remained at home and in possession
of the farm until the father died, on March 14, 1921, whereupon
then the deed sought to be set aside in this proceeding.
Applicant insists that this agreement is valid as to

the creditors of Noah W. Winn; that if such an agreement was made in 1909, it was a secret one about which no one had any knowledge other than the Winn family; that appellant's intestate had a right to rely upon what the records disclosed as to the ownership of this land and that the entire transaction is a gross fraud.

The evidence discloses that at the time Noah W. Winn purchased the land in 1909 he was 57 years of age, Fred was 26 and Elmer was 24. Prior to the time the farm was ^{purchased} ~~purchased~~, Noah and his sons lived on this land as tenants for three years and with his sons Noah W. Winn farmed this land and approximately 150 acres of other nearby lands which they rented. That at the time the land was bought in 1909 they had accumulated, by their joint efforts, Three Thousand Dollars, which was paid at the time the land was purchased. Fred and Elmer, before and after reaching their respective majorities, worked continuously for their father without compensation other than their living expenses, and continuously from 1907 up until the evidence was heard in this case before the Master in June 1933, Fred and Elmer continued to make their home upon this land. In 1906 the wife of Noah W. Winn died and a short time prior to her death Fred married and brought his wife to the farm and she has been the housekeeper for her husband, brother-in-law and father-in-law since that time. Noah W. Winn was called as a witness by the complainant and he testified that he was not physically able to do a full days work even in 1910, and that from and after the time his wife died, he had nothing to do with the management of the farm, but that the boys Fred and Elmer managed it.

Prior to February 26, 1921, Mark H. Winn, also a son of Noah W. Winn, but who was not living at home, was indebted to Dewey, Burge and Gould, bankers. On that date a renewal note for \$4000.00 evidencing Mark's indebtedness was executed, and

The executor of Noah's will; that at such an agreement was made in 1909, it was a secret one about which no one had any knowledge other than the inn family; that appellants' interest was a right to rely upon what the records disclosed as to the ownership of this land and that the entire transaction is a proper one.

The evidence disclosed that at the time Noah's will was made the land in 1909 he was 54 years of age, that his son and sister was 24. Prior to the time the farm was purchased Noah and his sons lived on this land as tenants for three years and with his sons Noah's wife farmed this land and approximately 150 acres of other nearby lands which they rented. That at the time the land was bought in 1909 they had accumulated, by their joint efforts, three thousand dollars, which was paid at the time the land was purchased. Fred and Elmer, before and after purchasing their respective majorities, worked continuously for their father without compensation other than their living expenses, and continuously from 1907 on until the evidence was heard in this case before the Master in June 1908, Fred and Elmer continued to make their home upon this land. In 1910 the wife of Noah's son died and a short time prior to her death Noah married and brought his wife to the farm and she has been the housekeeper for her husband, brother-in-law and father-in-law since that time. Noah's wife was called as a witness on the complaint and he testified that he was not physically able to do a full day's work even in 1910, and that Fred and Elmer at the time his wife died, he had nothing to do with the management of the farm, but that the boys Fred and Elmer managed it.

Prior to February 23, 1921, Noah's will was made by Noah's wife, but who was not living at home, was in respect to her, Fred and Elmer, partners. On that date a personal note for \$4000.00 evidenced Noah's indebtedness was executed, and

Noah W. Winn executed it with Mark. This note was renewed from time to time and the interest added thereto, and Onetta Nicholson, in the early part of 1927, purchased from Charles P. Dewey and Sons, bankers, successors to the firm of Dewey, Burge and Gould, a note evidencing a portion of this indebtedness. On March 1, 1930, the total amount of Mark's indebtedness aggregated \$9431.02, and was evidenced by four notes, two of which were for \$2500.00, one for \$1000.00 and one for \$3431.02. It was upon one of these \$2500.00 notes that judgment by confession was entered against appellee, Noah W. Winn, Mark H. Winn and his wife, Bessie Winn, on July 25, 1931.

The evidence further discloses that from 1910 to 1927, a checking account was carried in the Dewey Bank in the name of Noah W. Winn; that in 1927 that account was changed to Noah W. Winn and Sons, and so continued until after March 14, 1931; that the returns from the lands farmed by the father and sons went into these accounts and all bills were paid out of this common fund. Fred G. Winn wrote most of the checks upon this account from 1910 to 1931. His father wrote a few. The personal property on the farm was taxed in the name of Noah W. Winn and Son for the years 1918 to and including 1931; that from 1918 to 1930, both inclusive, the real estate was taxed in the name of Noah W. Winn, and after that it was taxed to Elmer Winn, et al, and the personal property for the years 1930 and 1931 was taxed in the names of Fred and Elmer Winn. The tax books disclose that Noah Winn paid the taxes from 1918 to 1926 inclusive, and for the year 1928, and that Noah Winn and Son paid them for 1927 and 1929, and that Fred G. Winn paid them for 1930 and 1931.

From the evidence the Master found that the contract relied upon by appellees, as set forth in their respective answers, was proven. That the initial cash payment of \$3000.00 made at the

Both W. Winn executed it with Mark. This note was received from time to time and the interest added thereto, and finally in 1930, in the early part of 1931, transferred from Charles W. Dewey and Sons, bankers, successors to the firm of Dewey, Burke and Sons, a note evidencing a portion of this indebtedness. On March 1, 1930, the total amount of Mark's indebtedness aggregated \$211.00, and was evidenced by four notes, two of which were for \$200.00, one for \$100.00 and one for \$11.00. It was upon one of these \$200.00 notes that judgment by confession was entered against appellant, John C. Winn, Mark C. Winn and his wife, Jessie Winn, on July 23, 1931.

The evidence further discloses that from 1910 to 1931, checking account was carried in the name of John C. Winn; that in 1927 that account was changed to John C. Winn and Sons, and so continued until either March 11, 1931; that the returns from the lands farmed by the father and sons went into these accounts and all bills were paid out of this common fund. Fred G. Winn wrote most of the checks upon this account from 1910 to 1931. His father wrote a few. The payments made on the farm was taken in the name of John C. Winn from 1910 to 1931, inclusive, the real estate was taken in the name of John C. Winn and after that it was taken as John Winn, et al, and the payments for property for the years 1930 and 1931 was taken in the name of Fred and John Winn. The tax books disclose that John Winn paid the taxes from 1910 to 1931 inclusive, and that John Winn and son paid them for 1932 and 1933, and that Fred G. Winn paid them for 1930 and 1931.

From the evidence the court found that the interest on the notes by appellant, as set forth in their respective answers, was \$200.00 the initial cash payment of \$200.00 made at the

time Noah W. Winn took title to this land was taken from a fund created by the joint endeavor of appellees. That Onetta Nicholson had no conversations or transactions with appellees, but the original note executed by Mark L. Winn and the renewals thereof were procured by the Dewey Bank and by the Bank sold to Onetta Nicholson and that the bank prior to the time Noah W. Winn became a joint maker with Mark Winn upon these notes, had extended credit to Mark Winn and not to Noah W. Winn.

Appellant insists that the evidence discloses that the agreement between Noah and his sons was a vague, indefinite, oral, secret contract, about which no one knew anything except the parties thereto, and to permit this conveyance to stand will result in a gross fraud upon appellant and the other creditors of Noah W. Winn.

We have examined the evidence with care. There was no attempt made to disprove the statement of facts found in the sworn answers of appellees, and we are not inclined to disturb the findings of the Master approved by the Chancellor. It is true that the contract between Noah and his sons was an oral one, but under the authorities, such contracts are not invalid when as here the evidence of the agreement with reference to the purchase of the land by Noah and the agreement by him to convey to his sons is neither indefinite or vague. True, the record title to this land was in Noah W. Winn, but the grantees in the deed sought to be set aside have lived thereon since 1907. They did most of the work. They rented other land. The income from all went into a common fund. They made improvements thereon, and a corn crib, cattle shed and garage were moved thereon from property owned by the wife of Fred G. Winn. While the possession of Elmer A. and Fred G. Winn was not exclusive, still it was of such character as to charge any one with constructive notice of all those facts which might have been learned respecting the title as inquiry

time Noah W. Winn took title to this land was given to him
created by the joint endeavor of appellants. That appellants
had no conversations or negotiations with appellants, but the ori-
ginal note executed by Mark L. Winn and the same is identical with
procured by the Devey Park and by the said sold to Devey Park
and that the parties prior to the time Noah W. Winn became a partner
taken with Mark Winn upon those notes, had no means credit to mark
Winn and not to Noah W. Winn.

Appellant insists that the evidence discloses that the
agreement between Noah and his sons was a verbal, confidential, oral,
secret contract, about which no one knew anything except the parties
thereto, and so permit this conveyance to stand will result in
gross fraud upon appellant and the other creditors of Noah W. Winn.

We have examined the evidence with care. There was no
attempt made to disprove the statement of facts found in the sworn
answers of appellants, and we are not inclined to distrust the find-
ings of the Master approved by the Chancellor. It is true that
the contract between Noah and his sons was an oral one, but under
the authorities, such contracts are not invalid when as here the
evidence of the agreement with reference to the purchase of the
land by Noah and the agreement by him to convey to his sons is
not in doubt. True, the record title to this land
was in Noah W. Winn, but the purchase in the deed seems to be
not valid have lived thereon since 1927. They did most of the
work. They rented other land. The income from all went into
a common fund. They made improvements thereon, and a common will,
estate and and estate were made thereon from property owned by
the wife of Fred G. Winn. Will the possession of land A. and
Fred G. Winn was not exclusive, still it was not such character as
to charge any one with constructive notice of all those facts
which might have been learned respecting the title in inquiry.

would have disclosed, and had complainant's intestate made inquiry in this case, she would have ascertained the agreement which existed between the father and sons. *Nelson v. Joshel*, 305 Ill. 420.

It is true also that this conveyance by Noah W. Winn rendered him insolvent, and the grantees knew such would be the result, but the general rule is that where property is transferred in payment of a debt, fraud can not be imputed to the creditor thus preferred because of his knowledge that the debtor is insolvent or that the transfer is all of the debtor's property. *First National Bank of Flora v. Cunningham*, 267 Ill. App. 430, citing 27 C. J. 629.

Finally appellant insists that if the evidence is sufficient to establish the agreement as appellees insist, that then by that agreement Elmer A. Winn and Fred G. Winn were entitled to receive their deed in March 1920, when the indebtedness upon this land was discharged, and as the deed was not executed until March 14, 1931, the original agreement is barred by the Statute of Limitations and that the course of dealing of the sons from 1920 to 1931 was such as to estop them from insisting, in this proceeding, that they are entitled to this land in pursuance of the contract made in 1909. There is no merit in this contention. The Statute of Limitations is a personal defense and there is nothing in the conduct of the sons from 1920 to 1931 of which appellant can complain. During this time they were in possession of the land as they had been for many years before, and we do not think it particularly strange that they did not insist upon their father making the conveyance. While, under the agreement, they were entitled to the conveyance in March 1920, the contract was completely executed more than four months prior to the time the judgment was obtained, which forms the basis of this proceeding.

The decree dismissing the bill for want of equity is affirmed.

DECREE AFFIRMED.

would not be disclosed, and had confidentially been disclosed in this case, the would have ascertained the agreement which existed between the father and son. Nelson v. Nelson, 200 Ill. 400.

It is true also that this conveyance by John A. Nelson transferred his interest, and the grantees knew even would be the result.

But the general rule is that where property is transferred in payment of a debt, fraud can not be imputed to the creditor, but preferred because of his knowledge that the debtor is insolvent or that the transfer is all of the debtor's property. First National Bank of Iowa v. Cunningham, 237 Ill. 407, 430, citing 27 C. 2. 323.

Finally, applicant insists that if the evidence is sufficient to establish the agreement as applicant insists, that sold by that agreement John A. Nelson and Fred A. Nelson were entitled to receive their deed in March 1920, when the indebtedness upon said land was discharged, and as the deed was not executed until March 14, 1921, the original agreement is barred by the statute of limitations.

It is true that the course of dealing of the sons from 1920 to 1921 was such as to keep them from believing, in this proceeding, that they are entitled to this land in pursuance of the contract made in 1903. There is no merit in this contention. The statute of limitations is a personal defense and there is nothing in the conduct of the sons from 1920 to 1921 of which applicant can complain. During this time they were in possession of the land as they had been for many years before, and we do not think it unfairly stated that they did not insist upon their father making the conveyance. While, under the agreement, they were entitled to the conveyance in March 1920, the contract was not actually executed more than four months prior to the time the judgment was obtained, which fixes the basis of this proceeding.

The decree dissolving the bill for want of equity is affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

97 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 636¹

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
MAY TERM, A.D. 1932.

PEOPLE OF THE STATE OF ILLINOIS on the
relation of and in the name of OSCAR
NELSON, Auditor of Public Accounts of
the State of Illinois,

Complainants

vs.

APPEAL FROM
CIRCUIT COURT,
McHENRY COUNTY.

UNITED STATE BANK OF CRYSTAL LAKE, a
corporation.

(ROBERT COWAN and HUGH COWAN,
Appellants.)

HUFFMAN-J.

The above cause comes to this court from the circuit court of McHenry county. The appellants were by the order of that court held to be in contempt, and were each ordered committed to the common jail of McHenry county for a period of 120 days, and each ordered to pay a fine in the sum of \$500, as a punishment for said contempt. It is manifest from the record that the trial judge proceeded upon the theory that this was a criminal contempt.

Robert Cowan is a farmer residing in McHenry county. He owns a farm of 160 acres upon which there is a mortgage for \$6600. Hugh Cowan, his brother, lives three miles north of the city of Aurora. It appears from the evidence that Robert Cowan purchased this farm from Christ Pfeiffer in 1911, paying therefor \$110 an acre; and that his brother Hugh, had advanced him \$2000 which went toward the purchase price of this farm; it further appears that subsequent

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
CITY TERM, A.D. 1933.

APPEAL FROM
CIRCUIT COURT,
McHenry County.

ROBERT COWAN and HUGH COWAN,
Appellants,
vs.
UNITED STATE BANK OF CRYSTAL LAKE,
Respondent.

HUFFMAN-1.

The above cause comes to this court from the circuit
court of McHenry County. The appellants were by the order of that
court held to be in contempt, and were each ordered committed to
the common jail of McHenry County for a period of 120 days, and were
ordered to pay a fine in the sum of \$200, as a punishment for said
contempt. It is manifest from the record that the trial judge
proceeded upon the theory that this was a criminal contempt.
Robert Cowan is a farmer residing in McHenry County.
He owns a farm of 160 acres upon which there is a mortgage for
\$6800. Hugh Cowan, his brother, lives three miles north of the city
of Aurora. It appears from the evidence that Robert Cowan purchased
this farm from Christ Teller in 1911, paying therefor the sum of
\$2000 and that his brother Hugh, had advanced him \$2000 which went toward
the purchase price of this farm; the further evidence that subsequent

to this time, the brother, Hugh, advanced to Robert the further sum of \$1100. These loans were evidenced by notes given at the time. Other smaller sums were advanced from Hugh to Robert, which were paid.

On June 22, 1931, Robert Cowan executed and delivered to Hugh Cowan his note in the sum of \$3000, together with a chattel mortgage upon certain personal property located upon his farm, as security for the payment of said note. The United State Bank of Crystal Lake, in McHenry county, failed. On July 3, 1931, a bill was filed in the circuit court of said county for the court to take jurisdiction of the case of this defunct bank. Order of the Auditor of Public Accounts appointing Frank J. Green receiver of said bank was filed in the circuit clerk's office on July 10, 1931. On November 9, 1931, the circuit court of said county, entered its decree taking jurisdiction of the matter and confirming the appointment of the said receiver.

When the above bank closed, Robert Cowan was indebted to it, and the receiver thereof took judgment against him for \$568.09. On January 18, 1932, subpoena issued from the office of the clerk of the circuit court, for Robert Cowan to appear before said court. In response to this subpoena he appeared in open court on January 21, 1932, whereupon, he was interrogated by the court regarding the giving of the above note and chattel mortgage to his brother Hugh. He then stated that the \$3000 note was given to his brother because of certain money that his brother had advanced to him from time to time. The cause was continued until January 27, 1932, for which time the court ordered Hugh Cowan to be subpoenaed. Both brothers appeared on that day, when they were for the first time represented by counsel. The court interrogated both of the Cowan brothers regarding the \$3000 note and chattel mortgage. Hugh Cowan stated that he surrendered to his brother \$3000 in old notes for the \$3000 note dated June 22, 1931,

to this time, the brother, Hugh, advanced in about the further sum
of \$1100. These loans were evidenced by notes given at the time.
Other smaller ones were advanced from Hugh to Robert, and were
paid.

On June 22, 1931, Robert Cowan executed and delivered to
Hugh Cowan his note in the sum of \$1000, together with a chattel
mortgage upon certain personal property located upon his farm, as
security for the payment of said note. The United States Bank of
Crystal Lake, in McHenry County, Illinois, a bill
was filed in the circuit court of said county for the entry in this
jurisdiction of the case of this chattel mortgage. Order of the
at Public Accounts appointing Frank L. Green receiver of said bank
was filed in the circuit clerk's office on July 10, 1931. On November
9, 1931, the circuit court of said county, entered its decree taking
jurisdiction of the matter and confirming the appointment of the said
receiver.

When the above bank closed, Robert Cowan was indebted to
it, and the receiver thereof took judgment against him for \$555.00.
On January 18, 1932, subpoena issued from the office of the clerk of
the circuit court, for Robert Cowan to appear before said court. In
response to this subpoena he appeared in open court on January 21, 1932,
whereupon, he was interrogated by the court regarding the debt of
the above note and chattel mortgage to his brother Hugh. He then
stated that the \$1000 note was given to his brother because of certain
money that his brother had advanced to him from time to time. The
cause was continued until January 27, 1932, for which time the court
ordered Hugh Cowan to be subpoenaed. Both brothers appeared on that
day, when they were for that time represented by counsel. The
court interrogated both of the Cowan brothers regarding the \$1000
note and chattel mortgage. Hugh Cowan stated that he advanced to
his brother \$1000 in old notes for the \$1000 note dated June 22, 1931.

which was secured by the chattel mortgage. He states that one of the notes so surrendered was a \$2000 note dated in 1912, and another, an \$1100 note dated in 1927, both signed by Robert Cowan. This witness exhibited a \$2000 check payable to Christ Pfeiffer dated March 2, 1912, signed by himself; an \$1100 note signed by Robert Cowan dated March 1, 1927, payable to Hugh; his check for \$600 dated February 20, 1919, payable to Robert Cowan; his check for \$600 dated September 11, 1911, payable to the order of Robert Cowan; his check for \$110 payable to the order of Robert Cowan and dated August 12, 1914. He stated that the smaller sums had been repaid by his brother Robert, that \$100 had been paid upon the \$1100 note, and that \$3000 was due from Robert to him at the time of the execution of the note and chattel mortgage.

During the examination of Hugh Cowan by the court, he was asked by said court the following question, with reference to the chattel mortgage given him by Robert as security for the \$3000 note; "Are you willing to release that chattel mortgage?" To which question the witness responded in the negative, whereupon the court responded, "let the clerk enter on the record that this proceeding is a proceeding of contempt of this court ***"

The court inquiring as to the initials of the two brother, then continuing, stated, that Robert Cowan and Hugh Cowan by the order of court must show cause why they should not be held in contempt for interfering with the receiver's settlement of the United State Bank of Crystal Lake.

Subsequently thereto, the court did enter its order finding Robert Cowan and Hugh Cowan to each be in contempt, and ordered that they each be committed to the common jail of McHenry county for 120 days and that they each pay a fine of \$500.

The record does not disclose any refusal on the part of either of the defendants below to obey any order of the court.

which was assigned by the first mortgage. It stated that one of the notes so assigned was a \$100 note dated in 1911, and another, \$1100 note dated in 1917, both assigned by Robert Brown. This witness exhibited a \$2000 check payable to Robert Brown, dated March 1, 1912, signed by Robert Brown; an \$1100 note assigned to Robert Brown dated March 1, 1917, payable to Robert Brown; the \$100 note dated February 10, 1911, payable to Robert Brown; his check for \$100 dated September 11, 1911, payable to the order of Robert Brown; his check for \$100 payable to the order of Robert Brown and dated August 1, 1914. He stated that the earlier note had been assigned to Robert Brown, that \$100 had been paid upon the \$1100 note, and that \$2000 was due from Robert to him at the time of the execution of the note and the first mortgage.

During the examination of Hugh Brown by the court, he was asked by said court the following questions, with responses to the answers given him by Robert as recorded for the record: "Are you willing to release that first mortgage?" "Yes"; "Which question the witness responded in the negative, regarding the court res ordered, 'let the clerk enter on the record that this mortgage is a proceeding or continuance of this court's case'?"

The court inquired as to the initials of the two persons, this continuing, stated, that Robert Brown and Hugh Brown by the record of court had been named as they should not be said in court for interference with the religious relations of the United States of Crystal Lake.

Subsequently, however, the court will enter the order finding Robert Brown and Hugh Brown to be in contempt, and entered that they each be committed to the county jail or prison for 120 days and that they each pay a fine of \$100. The court does not discuss any matters as the case of either of the defendants before to which any matter of the court.

No order was made upon Hugh Cowan to surrender or cancel the chattel mortgage and no proceedings were then before the court for such purpose. No written charge of contempt was filed against either of the defendants below, to which they might have answered and purged themselves of such charge.

The mortgage was executed before the court took jurisdiction of the Receivership of this bank. Nothing appears in the record to challenge or impugn the validity of the chattel mortgage. And as above stated, no proceedings were then pending before the court to attack it.

It is apparent that the court did not believe the evidence of the defendants, Robert and Hugh Cowan, with reference to the \$3000 note and chattel mortgage, as their testimony constitutes all the evidence presented on this question. The court was not justified in finding them guilty of contempt merely because he did not believe their testimony. People v. Paynter 250 Ill. App. 423; Anderson v. Macek 263 Ill. App. 564.

The judgment of the circuit court of McHenry county is reversed.

Judgment reversed.

no order was made upon them to answer or explain the
chattel mortgage and no proceedings were taken before the court for
such purpose. No written claim of ownership was filed against
either of the defendants below, to which their claims were answered
and waived themselves of such claims.

The mortgage was assigned before the court and under
direction of the receiver of this bank. Nothing was done in the
court to challenge or impugn the validity of the chattel mortgage.
And as above stated, no proceedings were taken pending before the
court to attack it.

It is argued that the court did not believe the
evidence of the defendants, Robert and John Brown, with reference to
the \$3000 note and chattel mortgage, as their testimony contradicted
all the evidence presented on this question. The court was not
assisted in finding their guilty of contempt solely because he did
not believe their testimony. People v. Wyster 120 Ill. 407, 412;
Mason v. Mason 188 Ill. App. 544.

The judgment of the circuit court of Henry county
is reversed.

Reversed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff. 273 I.A. 636²

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

In the Appellate Court of Illinois

Second District

October Term, A.D. 1932

The Security National Bank of

Downers Grove, Illinois,

Appellant

Appel from Circuit Court

vs.

Du Page County

Samuel Curtiss, Nettie R. Curtiss

and Edwin C. Curtiss,

Appellees,

Huffman, J.

This is a bill in equity brought by appellant against Samuel Curtiss, Nettie R. Curtiss, his wife, and Edwin C. Curtiss, their son, appellees. The purpose of the bill as claimed by appellant was to set aside a certain conveyance of real estate made by Samuel and Nettie Curtiss to their son Edwin. Appellees filed a general demurrer to the bill, which demurrer was sustained. Appellant elected to stand by its bill, whereupon judgment was entered in favor of appellees, and appellant brings this appeal.

It is urged by appellant that the bill was brought in aid of an execution, issued against Samuel Curtiss by virtue of a judgment against him and in favor of appellant, in the circuit court of Du Page county. It is urged by appellees that the suit as brought by appellant is a creditors bill and not a bill in aid of an execution; that it was first necessary as a jurisdictional requisite to the filing of a creditors bill, that the execution be returned nulla bona. The execution not having been so returned, appellees urge that the demurrer was properly sustained.

The only question involved in this appeal is the sufficiency of the bill of complaint. For a proper consideration of this question it is necessary to decide whether this action is a bill to set aside a fraudulent conveyance of real estate

In the Appellate Court of Illinois

Second District

October Term, A.D. 1937

The Security National Bank of

Downers Grove, Illinois,

Appellant

vs.

Samuel Gutman, Petitioner

and Edwin C. Gutman,

Appellees,

William, E.

This is a bill in equity brought by appellant against appellees

Gutman, William E., Edwin C. Gutman, and Samuel Gutman, their sons,

appellees. The purpose of the bill as claimed by appellant was to set

aside a certain conveyance of real estate made by Samuel and Mattie

Gutman to their son Edwin. Appellees filed a verified answer to

the bill, which answer was sustained. Appellant elected to stand

by its bill, whereupon judgment was entered in favor of appellees,

and appellant brings this appeal.

It is urged by appellant that the bill was brought in violation

of an execution, issued against Samuel Gutman by virtue of a judgment

against him and in favor of appellee, in the circuit court of De Kalb

County. It is urged by appellees that the bill is barred by statute.

It is a creature of a statute and not a bill in equity; that

it was first necessary to a judicially created right to the bill.

Appellees bill, that the execution be returned until the

execution not having been returned, appellees were barred from the execution.

was properly sustained.

The only question involved in this appeal is the sufficiency

of the bill of complaint. For a proper consideration of this question

it is necessary to recite briefly the facts which are set forth in

a fraudulent conveyance of real estate

in aid of an execution, in order that the property may be made subject to levy, as claimed by appellant; or a creditor's bill, as claimed by appellees.

The bill recites that on February 7, 1929, Samuel Curtiss became indebted to appellant, and as ^{an} ~~son~~ evidence of such indebtedness executed his promissory note; that on October 7, 1931, appellant recovered a judgment against the said Samuel Curtiss in the circuit court of Du Page county, for the sum of \$2223, and costs; that the said Samuel Curtiss was the owner in fee of certain described premises in Downers Grove, in said county; that prior to the rendition of the aforesaid judgment, Samuel Curtiss and Nettie R. Curtiss conveyed the said premises to their son, Edwin C. Curtiss; that execution issued upon the judgment and was placed in the hands of the sheriff of said county; that the sheriff has made demands upon the said Samuel Curtiss for a satisfaction, which were refused, and that the sheriff has been unable to find any lands, goods or chattels belonging to the said Samuel Curtiss upon which the judgment could be satisfied; that the judgment and execution are in full force and effect and unsatisfied; that the said sum of \$2223, together with interest and costs are due and unpaid. The bill further recites that it is brought, "for the sole purpose of compelling payment of said judgment." The bill alleges and claims that the conveyance from Samuel Curtiss and Nettie R. Curtiss, his wife, to Edwin C. Curtiss, the son, was a mere sham and made with the intention of defrauding the appellant, and denies that any consideration was paid by Edwin C. Curtiss to the said grantors, because of such conveyance; and alleges that Edwin C. Curtiss holds the property in trust for Samuel Curtiss, for the purpose of concealing the true ownership and preventing a

in aid of an execution, in order that the property may be made
subject to levy, as claimed by appellants; and a creditor's bill,
as claimed by appellees.

The bill recites that on January 7, 1883, Samuel Curtis
became indebted to appellants, and the ¹⁰execution of such in-
debtedness executed in ¹¹promissory note; that on October 7,
1881, appellants recovered a judgment against the said Samuel
Curtis in the circuit court of the same county, for the sum
of \$2325, and costs; that the said Samuel Curtis was the
owner in fee of certain described premises in Lawrence town,
in said county; that prior to the rendition of the aforesaid
judgment, Samuel Curtis and Bettie M. Curtis conveyed the
said premises to their son, Edwin C. Curtis; that the same
issued upon the judgment and was placed in the hands of the
sheriff of said county; that the sheriff has made demands
upon the said Samuel Curtis for a satisfaction, which have
been refused, and that the sheriff has been unable to find the
lands, goods or chattels belonging to the said Samuel Curtis
upon which the judgment could be satisfied; that the judgment
and execution are in full force and effect and undisturbed;
that the said sum of \$2325, together with interest and costs
are due and unpaid. The bill further recites that it is
brought, "for the sole purpose of compelling payment of said
judgment." The bill alleges and claims that the same is
from Samuel Curtis and Bettie M. Curtis, his wife, in favor
of Curtis, the son, who is now and was at the time of the
 rendition of said judgment, and claims that the same is
action was paid by Edwin C. Curtis to said appellants, for
cause of such conveyance; and claims that said Curtis
holds the property in trust for said appellants, for the
purpose of concealing the true ownership and preventing

levy and sale thereof under and by virtue of appellant's judgment and execution. The bill prays that the conveyance as to the appellant herein be set aside, vacated and declared null and void; that the appellant may be authorized to proceed upon its writ of fieri facias issued as aforesaid or upon another such writ as may be necessary; and that the sheriff of said county be directed to proceed to levy upon and advertise the sale of the said premises for the payment and satisfaction of appellant's judgment. The bill contains a prayer for general relief.

After a careful consideration of the bill of complaint in this case, we are of the opinion that it should be considered as a bill to set aside an alleged fraudulent conveyance of real estate, as an aid to appellant's execution, which it had caused to issue by virtue of its judgment against Samuel Curtiss. It is a well settled principle of equity that where the bill of complaint sets forth any claims or shows any grounds for equitable relief, that the same should not be dismissed for want of equity, on a general demurrer. *Brown, et al v. Hagle*, 30 Ill. 119, 138, 139; *Gooch v. Green*, 102 Ill. 507, 510, 511; *Wormley v. Wormley*, 207 Ill. 411, 420; *Regan v. Grady*, 343 Ill. 423, 427. This bill contains sufficient essential elements to show grounds for equitable relief, if the proof shows appellant entitled thereto, under the averments as made in the bill.

While the bill may be somewhat loosely drawn, yet we deem it sufficient as against a general demurrer. The bill contains a prayer for general relief, and the complainant under such a prayer is entitled to any relief the proof shows him entitled to, provided it is agreeable to the case made by the bill. *Van Zanten v. Van Zanten*, 269 Ill. 491, 497. As stated in the case of *Harmony Way Bridge Company v. Leathers*, 353 Ill., on page

The bill contains a provision for

[illegible]

398, "Where a bill in chancery contains a general prayer for relief it must be regarded as sufficient to support any decree warranted by the facts alleged in the bill."

The judgment of the circuit court of Du Page County is reversed and remanded with directions to overrule the demurrer to the bill of complaint.

Reversed and remanded
with directions.

312, "where a bill in ordinary contains a material provision for relief it must be regarded as sufficient to support the degree

warranted by the facts alleged in the bill."

The judgment of the circuit court of the State of New York is

reversed and remanded with directions to overrule the de-

creter to the bill of complaint.

Reversed and remanded.

With directions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 636³

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934

the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1932.

EMILY JANE CARLSON, Executrix
of the Estate of C. E. Carlson,
Deceased,

Appellee

vs.

APPEAL FROM
CIRCUIT COURT,
BOONE COUNTY.

HARRY SODERGREN, Claimant,
Appellant.

HUFFMAN-J.

The appellee, as executrix of the estate of Carl E. Carlson, filed her petition for citation against one William R. Winter, in the county court of Boone county, setting forth that the said Winter had in his possession a certificate of deposit in the sum of \$1000, issued to deceased by the Belvidere Bank of Belvidere, Illinois, which he refused to deliver to the petitioner, as executrix. It was claimed by the executrix that the certificate of deposit was the property of the estate of the said Carl E. Carlson. Harry Sodergren, appellant herein, claimed that he was the donee of this certificate of deposit from the deceased, as a gift causa mortis. The case was appealed to the circuit court of Boone county, where it was heard by the court without a jury. The court found that the said Carl E. Carlson retained control over said certificate during his lifetime, and that the evidence failed to establish a gift causa mortis from the deceased to appellant herein, as claimed.

IN THE
COURT OF COMMONS OF ILLINOIS
COUNTY OF COOK
OCTOBER TERM, A.D. 1902.

JOHN J. CARROLL, Executor
of the Estate of C. E. Carlson,
Deceased,

Appellee

JOHN J. CARROLL, Executor
of the Estate of C. E. Carlson,
Deceased,

vs.

HARRY CONNOR, Claimant,
Appellant.

WITNESSES-1.

The appellee, as executor of the estate of Carl E. Carlson, filed her petition for citation against the William A. Connor, in the county court of Cook county, setting forth that the said Connor had in his possession a certificate of deposit in the name of CARROLL, issued to deceased by the National Bank of Chicago, Illinois, which he refused to deliver to the appellee, as executor. It was claimed by the executor that the certificate of deposit was the property of the estate of the said Carl E. Carlson. Harry Connor, appellant herein, claimed that he was the owner of the certificate of deposit from the deceased, as a gift under will. The case was appealed to the circuit court of Cook county, where it was heard by the court without a jury. The court found that the said Carl E. Carlson retained control over his certificate during his lifetime, and that the evidence failed to establish a gift under will from the deceased to appellant herein, as claimed.

The evidence discloses that the deceased, was a farmer living near William R. Winter; that he was suffering from lung and heart trouble; that in September 1930, he gave the certificate of deposit to the said William R. Winter, stating that he was in failing health and that if he did not get over that "spell," he wanted Winter to give the certificate to his grandson, appellant herein, after his funeral. Carlson lived until the following November, which according to appellant's statement, was 86 days after appellant claims he made this gift. The testimony of Winter fails to show that the deceased surrendered control over the certificate, but on the contrary, the evidence of Winter establishes the fact that he held the certificate during the above time for the deceased, subject to his control and with the understanding on the part of Winter that the said deceased might have the certificate at anytime he desired it. It therefore appears that Winter held the certificate subject to the order of the deceased during his lifetime.

The donor must part with all control of the property in order to make it a valid gift. If he reserves any right or title the gift will be incomplete, and if the gift does not take effect as an executed and completed transfer to the donee, either legal or equitable during the life of the donor, it is a testamentary disposition, good only when made by a valid will. *Barnum v. Reed* 136 Ill. 388; *First Trust & Savings Bank v. Austin* 243 Ill. App. 386.

Appellant's witness, James Court, testified that he had known the deceased about 28 years, and saw him often. He was present at the time the deceased gave this certificate to Winter. He states that the deceased was then in about the same condition he had been for the last six months. He further states that the deceased for the last 10 years, had been subject to these sick spells, and that some days he would have them "real bad," while on other days they were not so bad. This witness says ~~that~~ the deceased was up and around the house the day he gave the certificate to Winter. The witness did not hear

The evidence discloses that the deceased, was a tenant living near William L. Winter; that he was suffering from lung and heart trouble; that in December 1930, he gave the certificate of descent to the said William L. Winter, stating that he was in failing health and that if he did not get over that "spell", he wanted Winter to give the certificate to his grandson, a certain Joseph, after his funeral. Carlson lived until the following November, when according to appellant's statement, was 38 days after appellant states he gave this gift. The testimony of Winter fails to show that the deceased transferred control over the certificate, but on the contrary, the evidence of Winter establishes the fact that he left the certificate during the above time for his deceased, subject to his control and with the understanding on the part of Winter that the said deceased might have the certificate at anytime he desired it. It therefore appears that Winter held the certificate subject to the wish of the deceased during his lifetime.

The donor must part with all control of the property in order to make it a valid gift. If he reserves any right in the gift it will be incomplete, and if the gift does not take effect as an executed and completed transfer to the donee, either formal or equitable during the life of the donor, it is a testamentary disposition, and only when made by a valid will. *Estimote v. Wood* 133 Ill. 383; *First Trust & Savings Bank v. Smith* 133 Ill. App. 385.

Appellant's witness, James Conner, testified that he had known the deceased about 15 years, and saw him often. He stated at the time the deceased gave him the certificate to Winter. He stated that the deceased was then in about the same condition as was seen for the first six months. He further stated that the deceased for the last 10 years, had been subject to these "spells", and that when they would have them "real bad", would on other days that were not so bad. This witness says that the deceased was up and around the house the day he gave the certificate to Winter. The witness did not hear

any of the conversation had between these parties at that time.

Winter states that Carlson was about 60 years old; that he had known him for 25 years, and his health "was very poor."

A gift causa mortis is a gift of personal property made by a party in expectation of death, then imminent, upon the condition that the property shall belong to the donee in case the donor die as anticipated. It is hardly sufficient that the donor is merely enfeebled by old age or realizes that in the natural course of events he must soon die from age or from some disease of long standing; but it is necessary to the validity of the gift of this kind, that he at the time be stricken with a malady that makes death impending and immediate. *Taylor v. Harmison* 79 Ill. App. 380.

An intention to make a gift will not suffice, as there must be other acts on the part of the donor done for the purpose of carrying out the intention and of vesting the gift in the donee. A gift causa mortis will be sustained only where the intention to make the gift is clear, and there must be a delivery of the subject of the gift and the title must pass at the time. It must be made in contemplation of death and death must have resulted as contemplated. If what was said and done by the donor is insufficient to pass title, the gift will fail, although the intention to make the gift may appear. Gifts in the nature of testamentary bequests can become operative only when executed by the donor in writing, in conformity with the Statute of Wills. *Hopkins v. Hughes* 340 Ill. 604.

The burden of proof is on the donee to prove all facts essential to a valid gift, and the great weight of authority is that the proof to sustain the gift must be clear and convincing. *Rothwell v. Taylor* 303 Ill. 226; *Barnum v. Reed* 136 Ill. 388.

The only question before this court is whether the proof on the part of appellant meets the requirements of law as to what is necessary to pass title, in this case, to the certificate of deposit, as a valid

any of the conversation had between these parties at that time.

It is further stated that Gifford was about 80 years old at that time.

"He was very poor."

A gift cannot be made by a gift of a thing of value.

by a party in contemplation of death, then testamentary, and the condition

that the property shall belong to the donee in case the donor die is

enforced. It is merely a statement that the gift is made by a

party of old age or realizes that in the future he will be

unable to take care of himself, and that he wishes to provide for

it is necessary to the validity of the gift of this kind, that the

time be stated with a certainty that the gift is made by a

testator. *Legator v. Barman* 30 Ill. App. 2d.

An intention to make a gift will not suffice, if there is

no other act on the part of the donor to show the purpose of making

the gift. The intention and of vesting the gift in the donee.

There will be no statement only where the intention to make the gift is

clear, and there must be a delivery of the subject of the gift and the

title must pass at the time. It must be made in contemplation of death

and death must have resulted or be contemplated. It must be made by a

party who is incompetent to make title, the gift must be made by a

party who is incompetent to make the gift may be made by a party who is

mentally incompetent can become operative only when accepted by the donee

in writing, in conformity with the statute of Illinois. *Legator v. Barman*

30 Ill. App. 2d.

The burden of proof is on the donee to show that the gift is

valid to a valid gift, and the exact weight of authority is that the donor

to maintain the gift must be shown and established. *Legator v. Barman*

Ill. App. 2d; *Barman v. Poel* 111. App. 2d.

The only question before the court is whether the gift on the

part of appellant meets the requirements of law as to what is necessary

to pass title, in this case, to the certificate of deposit, as a valid

gift causa mortis. Appellant, of course, contends that the proof is sufficient to establish the validity of the gift as claimed. We have examined the record with much concern, and we are compelled to the conclusion that appellants proof fell short of establishing this gift as claimed. The judgment of the circuit court of Boone county is therefore affirmed.

Judgment affirmed.

all cases where, because of some, possibly, the most
efficient to establish the validity of the claim as a matter of
fact, have examined the record with such interest, and we are satisfied to
the conclusion that a patent right is a thing of value, and that
it is as clear. The right of the patent owner to have his
invention protected.

Respectfully,
Your obedient servant,
J. Edgar Hoover

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in
the year of our Lord one thousand nine hundred and thirty-three,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 636⁴

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1933.

WALTER MASCHE, By OTTO W. MASCHE,
his father and next of friend,
Defendant in Error

vs.

WILLIAM H. GITCHELL, doing business
as GITCHELL TRANSFER COMPANY,
Plaintiff in Error.

WRIT OF ERROR TO
CIRCUIT COURT
WINNEBAGO COUNTY.

HUFFMAN-J.

Defendant in error, hereinafter called plaintiff, secured a judgment against plaintiff in error, hereinafter called defendant, in the circuit court of Winnebago county, in the sum of \$3950 for personal injuries received by a collision between defendant's truck and a motorcycle then being ridden by plaintiff. Plaintiff was proceeding south upon South Main Street in the city of Rockford and defendant's truck was proceeding north upon said street and immediately behind a milk wagon. The driver of the truck started to pass the milk wagon, and in doing so, the truck and plaintiff's motorcycle collided, the plaintiff thereby sustaining the injuries sued for. The plaintiff was taken to the Rockford hospital. Doctor Horace Dunn, a physician and surgeon of the city of Rockford, attended plaintiff. The accident happened on March 23, 1931, and the Doctor treated plaintiff from that time until in September 1932. Plaintiff's left leg was so badly bruised and swollen that the

IN THE

CIRCUIT COURT OF CHICAGO

SECOND DISTRICT

OCTOBER TERM, A. D. 1933.

WALTER MASORE, BY OTTO W. MASORE,
his father and next of friend,
Defendant in Error

WILLIAM H. CHITCHELL, doing business
as CHITCHELL TRADING COMPANY,
Plaintiff in Error

vs.

WILLIAM H. CHITCHELL, doing business
as CHITCHELL TRADING COMPANY,
Plaintiff in Error.

WITNESSES

Defendant in error, hereinafter called plaintiff, secured
a judgment against plaintiff in error, hereinafter called defendant,
in the circuit court of Cook County, in the sum of \$3000.00
personal injuries received by a collision between defendant's truck
and a motorcycle then being ridden by plaintiff. Plaintiff was
proceeding south upon South Main Street in the city of Chicago and
defendant's truck was proceeding north upon said street and
immediately behind a milk wagon. The driver of the truck started
to pass the milk wagon, and in doing so, the truck and plaintiff's
motorcycle collided, the plaintiff thereby sustaining two injuries
and for. The plaintiff was taken to the Cook County Hospital. Doctor
George Dunn, a physician and surgeon of the city of Chicago,
attended plaintiff. The accident happened on March 23, 1931, and
the doctor treated plaintiff from that time until in September 1932.
Plaintiff's left leg was so badly bruised and swollen that two

fracture of the bones therein could not be reduced until after the first few weeks. Some time after May 5th, 1931, the surgeon operated upon plaintiff's leg under a general anaesthetic and placed a steel plate with screws bolted to the bone at the side of the largest fracture. The plate was allowed to remain there for a couple of months when it was removed and further work performed by the surgeon to align the broken fragments. The tibia, or large bone of the leg, was broken once, and the fibula, or small bone, was broken twice. The evidence of the doctor is to the effect that the leg will never become normal, and that there is a permanent impairment thereof.

Defendant urges three causes for reversal of this case, the first of which is directed toward the giving of instructions based upon general negligence and not being confined to the specific acts of negligence specified or charged in the declaration. The declaration consisted of two counts, and in effect charged general negligence in the operation of the truck with the result that the same was driven into and against the motorcycle of plaintiff. After an examination of the instructions complained of by defendant together with the declaration, we do not find reversible error. *Springfield Consolidated Ry. Co. v. Puntenev* 200 Ill. 9; *West Chicago St. Ry. Co. v. Musa* 180 Ill. 130. It appears that defendant gave an instruction similar to those complained of that were given by plaintiff. Should any error have existed on account of plaintiff's instructions as thus urged by defendant, the defendant would be precluded from now urging same. *Illinois Steel Co. v. Novak* 184 Ill. 501; *Miller v. Blumenshine* 343 Ill. 531.

The second point urged for reversal by defendant below is based upon the claim that the verdict is not supported by a preponderance of the evidence. It is urged by defendant that due to

the fact that the plaintiff was the only person who testified in his behalf as to the facts and circumstances connected with the accident, and since several witnesses testified on behalf of defendant, that the verdict is contrary to the weight of the evidence. The driver of the truck stated that he saw plaintiff coming toward him on the motorcycle; that he was looking at plaintiff; and says that when he undertook to pass the milk wagon: "I thought I would get by before he came." The jury heard the witnesses testify. If the testimony of plaintiff when considered alone, fairly authorizes the verdict, courts of review will not disturb the same unless clearly contrary to the evidence or some error of law has been committed. The People v. Wallage 353 Ill. 95, 106; Blackhurst v. James 304 Ill. 586; Dick v. Zimmerman 105 Ill. App. 615. Under all the facts and circumstances in the case, we are unable to say that the verdict is against the manifest weight of the evidence.

The third point urged for reversal by defendant below, is the fact that plaintiff in his declaration claimed for doctor bills and hospital bills incurred in and about his care and treatment for the injuries received from the accident. Defendant urges that this constitutes reversible error. Dr. Dunn's bill amounted to \$283 and the hospital bill amounted to a total of \$278.50. There was no dispute as to these items. The evidence shows that the hospital bill was charged directly to Walter Masche. It does not appear to whom the doctor bill was charged. The general rule appears to be that in cases of injury to minors, the parent of the injured child takes his right of action for loss of services and expenses of medical treatment and hospital attention. Where the action is brought by a parent or child for personal injuries to the latter and a claim is made for the expenses necessarily incurred in curing or attempting to cure the injuries, including doctor bills, medicines, nursing and hospital

the fact that the plaintiff was the only person who testified in his
detail as to the facts and circumstances connected with the accident,
and since several witnesses testified on behalf of defendant, that
the verdict is contrary to the weight of the evidence. The driver
of the truck stated that he was positively certain that he saw the
not recall; that he was looking at plaintiff; and that after that time he
understood to pass the milk wagon: "I thought I was not yet before
his name." The jury heard the witness testify. If the testimony
of plaintiff when considered alone, fairly entitles the verdict,
points of review will not disturb the same unless clearly contrary
to the evidence or one error of law has been committed. The same
v. Village 223 Ill. 92, 193; Jackson v. James 203 Ill. 200; 191
v. Garretts 102 Ill. App. 615. Under all the facts and circumstances
in this case, we are unable to say that the verdict is against the
manifest weight of the evidence.

The third point raised for reversal by defendant below, is
the fact that plaintiff in his declaration claimed for doctor bills
and hospital bills incurred in and about his injury and treatment for
the injuries received from the accident. Defendant urges that since
no estimate reversible error. Dr. Dunn's bill amounted to \$100.00
the hospital bill amounted to a total of \$175.00. There was no
dispute as to these items. The evidence shows that the hospital bill
was charged directly to Walter Muehle. It does not appear to be
the doctor bill was charged. The medical bills appear to be for
cases of injury to others, the name of the injured being given
right of action for loss of services and expenses of medical treatment
and hospital attention. Where the action is brought by a person or
child for personal injuries to the latter and a claim is made for the
expenses necessarily incurred in caring or attending to care the
injuries, including doctor bills, medicine, nursing and hospital

attendance, and the parent and the child stand in the usual situation, the parent and not the child is entitled to recover for such damages. *Meece v. Holland Furnace Co.* 269 Ill. App. 164; 14 RCL 293; 20 RCL 615. An extensive collation of cases dealing with this question will be found in 37 ALR 14, 29, 58, in which holdings of the various states are reviewed, including the state of Illinois.

The estate of a minor is liable for necessities and it can hardly be denied that medical attention and hospital care following serious bodily injuries, are necessities and would clearly fall within such rule. There are variations and distinctions drawn with respect to the general rule as above stated, and in many cases the matter rests upon the facts of that particular case. The evidence in this case shows that the minor, Walter Masche, was 18 years of age; that he was working and earning \$9 a week; that he paid the most of it to his parents for room and board and used the balance to buy clothes and other necessities. The charge at the hospital was made directly against the minor. The father who brings this suit as next friend, has suffered no pecuniary injury with regard to any outlay for hospital bills; neither does the evidence disclose that he has sustained any such injury with regard to any outlay for medical expenses.

From an examination of cases of this nature, we believe that it may be adduced that the rule is that if it appears that the child is emancipated so as to be primarily responsible for the bills, or has paid them, or assumed to pay them, or is otherwise held primarily responsible for their payment, that the right of recovery therefor may rest in the child. In this connection a very pertinent statement appears in the case of *I. C. R. R. Co. v. Gernigan* 101 Ill. App. 1, in which opinion on page 11 thereof, the court in referring to medical and hospital expenses in a case of this nature, says: "These expenses were for necessities for which, under the facts

attendance, and the parent and the child stand in the same situation, the parent and not the child is entitled to recover for such damages.

These v. Hollins, 100 Ill. 402, 100 Ill. 402, 100 Ill. 402, 100 Ill. 402, 100 Ill. 402.

115. An extensive collection of cases relating to this question will

be found in 17 Am. 14, 15, 16, in which holding of the various

states are reviewed, including the state of Illinois.

The estate of a minor is liable for necessities and it

can hardly be denied that medical attention and hospital care following

various bodily injuries, are necessities and so is liability for such

such bills. There are variations and distinctions between the various

to the general rule as above stated, and in many cases the latter

rests upon the facts of each particular case. The evidence in this

case shows that the minor, after the injury, was 19 years of age; that

he was working and earning \$2 a week; that he paid the cost of all

his parents for room and board and also the balance of his expenses

and other necessities. The charge at the hospital was \$100 per day

against the minor. The father and mother did not pay anything

has suffered no pecuniary injury with regard to any other

hospital bills; neither does the evidence disclose that the mother

tailed any such injury with regard to any other for medical

from an examination of each of these cases, we believe

that it may be advanced that the rule is that if it appears that the

child is connected so as to be liable for necessities for the child,

or has paid them, or assumed to pay them, or is otherwise held

and early responsible for their payment, that the parent or guardian

therefor may rest in the child. In this connection a recent

statement appears in the case of E. v. E. 100 Ill. 402, 100 Ill. 402.

App. 1, in which opinion as well as in the text, the court is expressing

to medical and hospital expenses in a case of this nature, says:

These expenses were for necessities for which, under the facts

disclosed in the record, with the reasonable inferences deducible therefrom, this infant's estate is liable to the parties who furnished the same. Appellee has by implication of law incurred this liability for expenses in and about being healed, and ought to recover for it, which goes without saying, that if appellant is liable at all for the injuries to this child, which made these expenses necessary, that the expenses are a part of its liability to someone. This record discloses such state of facts as to make it certain that if appellant shall be required to pay the judgment as rendered by the circuit court, it will be fully protected from any liability to pay these expenses over again, either to appellee or to anyone else, and this is all the interest appellant can have in that question." This case was affirmed in 198 Ill. 297.

The father instituted this suit for the plaintiff as next friend, and the father and the mother of plaintiff both filed their waiver and release of all claims and rights against the defendant for hospital and medical expenses of every kind connected with the care and treatment of the child, growing out of this accident, and made affidavit that they had not instituted any action or proceeding to recover same.

Our views in this case are in accord with the above expression from the Gernigan case. The defendant in this suit, if he is liable for the injuries sustained by plaintiff, is also liable for medical and hospital expenses, as a part of such damages; and further, if the judgment rendered herein should be paid by the defendant, he will be fully protected from any liability to again pay the hospital and medical expenses, either to the plaintiff or to his parents, or anyone else; and as stated in the above case, we feel that this is all the interest that the defendant can now have in this question before this court in this appeal.

enclosed in the record, with the reasonable expenses therein
 mentioned, this infant's estate is liable to the parties
 mentioned the same. Appellate has by limitation of law limited
 this liability for expenses in and about being heard, and until to
 recover for it, which was also agreed, that it was liable to liable
 at all for the expenses to this child, which made these expenses
 necessary, that the expenses are a part of its liability to someone.
 This record discloses such state of facts as to make it certain that
 it is apparent that he required to pay the judgment as rendered by the
 court, it will be fully protected from any liability to pay
 these expenses over again, either in relation to his own estate, and
 that is all the interest a plaintiff can have in that question. This
 case was affirmed in the Ill. App.

The father instituted this suit for the liability of his
 child, and the father and the mother of plaintiff both filed their
 answer and release of all claims and rights against the defendant for
 medical and hospital expenses of every kind connected with the
 treatment of the child, growing out of this accident, and now
 certify that they had not instituted any action or proceeding to
 recover same.

Our view in this case and in record with the
 exception from the German case. The defendant in this suit, it
 is liable for the injuries complained of, it is also liable
 for medical and hospital expenses, as a part of such damages; and
 further, if the defendant rendered medical service as part of the
 defendant, he will be fully protected from any liability to pay
 the hospital and medical expenses, either by the plaintiff or by
 his parents, or anyone else; and is liable in the same way in this
 that this is all the interest that the defendant can have in this
 question before this court in this regard.

Persons who are not under legal disability have a right to waive or release claims against others. The parents of this boy, having filed their release and waiver of all claims for hospital and medical expenses, could not be heard to again claim recovery for same, after payment of this judgment by defendant. We do not perceive how the rights of the defendant can be prejudiced by the inclusion of such expenses in this judgment. In a more recent case in this state, Sczuck v. Chicago Ry. Co. 229 Ill. App. 325, the recovery of doctor bills were held proper for a married woman, even though her husband was liable under the statute for the same, and had not relinquished or waived his claim thereto.

The judgment of the circuit court of Winnebago county is affirmed.

Judgment affirmed.

persons who are not under legal disability have a right to waive or release claims against others. The purpose of this bill, having filed their release will deliver to all claims for hospital and medical expenses, could not be denied to claim claim recovery for care after payment of this judgment by defendant. He is not entitled to

the right of the defendant can be restricted by the limitation of such expenses in this judgment. In a more recent case in this state, *Seaton v. Chicago & N. W. Ry. Co.*, 229 Ill. App. 3d, the recovery of doctor bills were held proper for a married woman, even though her husband was liable under the statute for the same, and had not relinquished or waived his right thereto.

The judgment of the circuit court of Cook County

is affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

1017
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 036⁵

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1933.

FIRST NATIONAL BANK, a corporation,
etc.,

Appellant,

vs.

Appeal from the Circuit
Court of Winnebago County

ANTONIO PARIS, (Johnson Lumber and
Fuel Company,

Appellee)

HUFFMAN-J.

Antonio Paris and his wife executed their promissory note in the sum of \$4500, on October 18, 1928, payable to the Prudential Insurance Company of America. On the same date, the makers of said note executed a real estate mortgage on lot 8 of the Lindblade subdivision, located in the city of Rockford. This mortgage was recorded in the recorder's office of Winnebago county on October 24, 1928. The note and mortgage were delivered to the said Prudential Insurance Company.

On February 11, 1929, appellee herein, the Johnson Lumber & Fuel Company filed its bill of complaint in the Circuit Court of Winnebago County for the foreclosure of a mechanic's lien upon the above lot. Service was had upon the defendants in that suit, including the Prudential Insurance Company of America, and on July 16, 1929, the Prudential Insurance Company was defaulted and the cause came on for hearing before the court. Decree in favor of the appellee herein was entered in that cause, and the court therein found that the mortgage of the Prudential Insurance Company was a junior lien and subject to the rights of the said Johnson Lumber & Fuel Company. The debt was not satisfied as ordered and the property on September 12, 1929, was sold pursuant to said decree, by the master in chancery of the Circuit Court, after due notice.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1923.

FIRST NATIONAL BANK, a corporation,
Appellant,
vs.

Appellee.
Appeal from the Circuit
Court of Winnebago County

ANTONIO PARIS, (Johnson Lumber and
Fuel Company),
Appellee)

REPLY.

Antonio Paris and his wife executed their promissory note in the sum of \$4500, on October 12, 1922, payable to the First National Insurance Company of America. On the same date, the master of said note executed a real estate mortgage on lot 3 of the Rockford subdivision, located in the city of Rockford. This mortgage was recorded in the recorder's office of Winnebago County on October 24, 1922. The note and mortgage were delivered to the said First National Insurance Company.

On February 11, 1923, appellee herein, the Johnson Lumber and Fuel Company, filed its bill of complaint in the Circuit Court of Winnebago County for the foreclosure of a mortgage of a certain lot above lot. Service was had upon the defendant in that suit, and the First National Insurance Company of America, and on this 11, 1923, the First National Insurance Company was notified and the cause came on for hearing before the court. Orders in favor of the appellee herein was entered in that cause, and the court found that the mortgage of the First National Insurance Company was junior lien and subject to the right of the said Johnson Lumber and Fuel Company. The debt was not satisfied as ordered and the property on September 12, 1923, was sold pursuant to said order, by the master in chancery of the Circuit Court, after due notice.

No redemption was made from said sale, and on December 15, 1930, the master executed his deed for the premises, which deed was recorded on the following day.

On December 29, 1929, the above note and mortgage were assigned, transferred and set-over by the Prudential Insurance Company to the First Union Trust & Savings Bank of Chicago, without recourse. This assignment was not recorded in the Recorder's office of Winnebago County until February 13, 1931.

Appellant herein, the First National Bank of Chicago, on July 15, 1933, became the holder of the note and mortgage by assignment from the First Union Trust & Savings Bank. On August 14, 1931, the First Union Trust & Savings Bank filed its bill in the Circuit Court of Winnebago county seeking to foreclose the said mortgage upon these premises. On July 25, 1933, the appellant, the First National Bank of Chicago, was granted leave to intervene as a party complainant in said bill to foreclose, because of its assignment of the said note and mortgage from the First Union Trust & Savings Bank. Thereupon, the appellant filed its supplemental bill of complaint in said cause, becoming the party complainant and seeking the relief as set out in the original bill. It was ordered that all proceedings in said cause should thereafter be entitled: "First National Bank of Chicago v. Antonio Paris, et al." The answer of appellee as therefore filed was ordered to stand as an answer to appellant's supplemental bill. Thereafter the court entered its decree finding the equities to be with appellee and dismissing the original bill of complaint and the supplemental bill of complaint for want of equity.

The appellant prosecutes this appeal and urges that it was the owner of the note and mortgage from their execution, and that the Prudential Insurance Company never had any title to the same. The record title was in the Prudential Insurance Company. The note and mortgage were both payable to said insurance company. There was nothing to put appellee upon notice of the rights of any other person in said note and mortgage other than the holder of record

no redemption was made from said sale, and on December 12, 1925, the master executed his deed for the premises, which deed was recorded on the following day.

On December 23, 1925, the above note and mortgage were assigned, transferred and set-over by the Prudential Insurance Company to the First Union Trust & Savings Bank of Chicago, Illinois. This assignment was not recorded in the recorder's office of Cook County until February 12, 1926.

Appellant herein, the First National Bank of Chicago, on July 15, 1925, became the holder of the note and mortgage by assignment from the First Union Trust & Savings Bank. On August 14, 1925, the First Union Trust & Savings Bank filed its bill in the Circuit Court of Cook County seeking to foreclose the said mortgage upon these premises. On July 27, 1925, the appellant, the First National Bank of Chicago, was granted leave to intervene as a party complainant in said bill to foreclose, because of its assignment of the said note and mortgage from the First Union Trust & Savings Bank. Thereupon, the appellant filed its supplemental bill of complaint in said cause, becoming the party complainant and seeking the relief as set out in the original bill. It was ordered that all proceedings in said cause should thereafter be entitled: "First National Bank of Chicago v. Antonio Faria, et al.". The matter of appeal as heretofore filed was ordered to stand as an action to set aside the supplemental bill. Thereafter the court entered its decree dismissing the equities to be with appellee and dismissing the original bill of complaint and the supplemental bill of complaint for want of equity. The appellant prosecutes this appeal and urges that it was the owner of the note and mortgage from their execution, and that the Prudential Insurance Company never had any title in the same. The record title was in the Prudential Insurance Company. The note and mortgage were both payable to said insurance company. It is urged nothing to put appellee upon notice of the rights of any other person in said note and mortgage other than the holder of record.

thereof, which was the Prudential Insurance Company of America. A party relying upon a clear and regular title of record should be protected as against secret adverse titles or liens, of which he had no notice. *Doyle v. Barnard* 271 Ill. App. 579; 590; *Ogle v. Turpin* 102 Ill. 148; *Edgerton v. Young* 43 Ill. 464.

Appellant also seeks to attack the decree in this case, urging that the service had by appellee upon the Prudential Insurance Company in the lien foreclosure, was not sufficient and that the court in that case was without jurisdiction. This objection is based upon the fact that the deputy sheriff who served the summons in the lien foreclosure suit, after showing service upon the Prudential Insurance Company of America by serving E. C. Stockburger, agent of said company, failed to recite the fact that the president of the Prudential Insurance Company of America, was not found in the county. Appellee in this present suit was permitted to amend the summons in the mechanic's lien suit in accordance with the facts. The deputy sheriff who served the summons testified in this case that he made inquiry for the purpose of ascertaining if the president of the Prudential Insurance Company of America, lived or was to be found in Winnebago County, before he made service upon the agent and before he endorsed his return upon the summons. He states that upon learning that the president of the Prudential Insurance Company did not reside in and was not to be found in Winnebago County, that he made the service and return as aforesaid. The court in this case permitted the summons to be amended by adding the words, "President of the Prudential Insurance Company of America not found in my county"

We are of the opinion that this did not constitute reversible error in this case. *Plaining Mill Co. v. National Bank* 86 Ill. 587, 590; *Tewalt v. Irwin* 164 Ill. 592; *Hinkle v. City of Mattoon* 170 Ill. 316. The amendment to the summons was made in accordance with the facts. Section 11 of the Lien Act provides that the complainant or petitioner shall make all parties interested, of whose interest he is notified or has knowledge, parties defendant, and summons shall issue and service thereof be had as in suits in chancery. There was

nothing appearing to give the appellee, who was complainant or petitioner in the lien suit, any notice or knowledge, or any cause to be put upon notice, that the appellant herein was in any way interested, or that any other person or persons whose names were unknown, were interested. Section 57 of the Chancery Act, Cahill St. 1931, provides that every suit in equity affecting or involving real property, shall, from the time of the filing of the bill, be constructive notice to all persons subsequently acquiring an interest in or lien upon the property involved, who is not in possession of such property and whose interest or lien therein is not shown of record at the time of the filing of such bill. And this section provides that all such parties shall be deemed subsequent purchasers and shall be bound by the proceedings to the same extent and the same manner as if they were parties thereto.

The note and mortgage in this case were given directly to the Prudential Insurance Company as mortgagee, and the mortgage was properly recorded in the recorder's office of Winnebago county. The record remained in this condition until February 13, 1931, when the assignment to appellant was recorded. This was some two months after the master's deed had been delivered pursuant to sale of the premises which sale was had more than 15 months previous.

We find no reversible error in the record, and the judgment of the Circuit Court of Winnebago County is affirmed.

Judgment affirmed.

nothing appearing to give the appellee, who was complainant on
petitioner in the last suit, any notice or knowledge, or
cause to be put upon notice, that the appellant herein was in
any way interested, or that any other person or persons whose
names were unknown, were interested. Section 15 of the Illinois
Act, Chapter 131, provided that every suit in equity, except
one involving real property, shall, from the time of the filing
of the bill, be constructive notice to all persons who subsequently
acquire an interest in or lien upon the property involved; who
is not in possession of such property and whose interest or lien
therein is not shown of record at the time of the filing of such
bill. And this section provides that all such parties shall be
deemed independent purchasers and shall be bound by the proceedings
to the same extent and in the same manner as if they were parties thereto.
The note and mortgage in this case were given directly to the
Federal Insurance Company, as mortgagee, and the mortgage was
properly recorded in the recorder's office of Winnebago County.
The record remained in this condition until February 15, 1931, when
the said record to appellee was recorded. This was some two months
after the master's deed had been delivered pursuant to sale of the
premises which sale was held more than 15 months previous.
We find no reversible error in the record, and the judgment
of the Circuit Court of Winnebago County is affirmed.

Two dissenting.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

102 17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and thirty-three, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

273 I A 637'

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

JAN 1 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A.D. 1933.

GARY-WHEATON BANK, a corporation,
Complainant Interpleader

vs.

APPEAL FROM
CIRCUIT COURT
DU PAGE COUNTY.

J. MITCHELL HOWARD, et al.,
(AMERICAN EXPRESS COMPANY,
Appellant.)

HUTTMAN-J.

This is a bill of interpleader filed by the Gary-Wheaton Bank of Wheaton, Illinois, in the circuit court of Du Page county. The sum of \$4410 was on deposit in this bank to the credit of J. Mitchell Howard, appellee herein. The American Express Company, appellant herein, was disputing the right to this money, claiming ownership thereof in itself. The deposit came about by virtue of a loan of that sum of money by W. H. Jones to W. S. Acton, both of Lewistown, Montana. Acton procured the loan for himself and Howard. Jones secured travelers cheques of the American Express Company from the Columbus State Bank of Columbus, Mont. These travelers cheques were sent directly to the Gary-Wheaton Bank and deposited therein to the credit of J. Mitchell Howard.

W. H. Jones established his residence in Columbus, Montana, in May 1917. He removed from the city of Columbus to the city of Lewistown, Mont., about November 1930, receiving at that

time the appointment of county extension agent for Fergus county, in which the city of Lewistown was situated. W. S. Acton resided in Fergus county and was there engaged in the live stock production business, being associated in this enterprise with his uncle, J. Mitchell Howard, of Wheaton, Ill.

When Mr. Jones went to Fergus county for the purpose of trying to secure the appointment as county extension agent, he met Mr. Acton and other men who were engaged in the stock business. He gave these men his references. After Jones received his appointment as county extension agent and removed to Lewistown, Mr. Acton approached him for a loan, which he wished to use in his live stock business. Jones advised Acton that he had a certificate of deposit in the Columbus State Bank at Columbus, Mont., in the sum of \$4410, that had matured, and that he would let Acton have any part or all of this money. Following this conversation, the loan was agreed upon. Acton executed and delivered to Jones his note for \$4410. Acton and Jones went to the Columbus State Bank at Columbus, Mont., where the certificate of deposit was surrendered by Jones and the bank issued to him American Express Company Travelers Cheques in the sum of \$4410. These cheques were forwarded to the Gary-Wheaton Bank with instructions to said bank to deposit them to the credit of J. Mitchell Howard. Mr. Howard states that the cheques were received and credited to his account as aforesaid on December 22, 1930, but he was instructed by said bank not to draw against this fund until the cheques reached New York City and were paid.

The Gary-Wheaton Bank forwarded these cheques to its correspondent bank in New York City, the Chatham-Phenix National Bank, which bank presented the cheques to the American Express Company and received payment thereon. This bank then advised the Gary-Wheaton Bank that the cheques had been paid. The Gary-Wheaton Bank notified Mr. Howard on December 26, 1930, that the cheques had been paid and that he might proceed to draw against this fund. Sub-

business, being associated in this enterprise with his mother, in 1926, and was there engaged in the live stock business in which the only connection was obtained, W. J. Brown residing in the neighborhood of 10000 1/2 Avenue Street, New York, New York.

11. The following is a list of the names of the persons who have been appointed to the various committees of the Board of Directors of the City of New York, for the year 1901:

Yb number and Yb values range of 19904, 19905

... and other men who were arrested in the same manner. ...

On the Columbia State Bank at Columbia, South Carolina, in the year 1934, business. Jones advised agent that he had a collection of deposits recommended him for a loan, which he asked to use in his law office. Jones advised agent and reviewed the collection, etc. Jones

The following is a list of the names of the persons who were present at the meeting of the Board of Directors of the United States National Bank, held on the 10th day of January, 1900, at the City of New York, New York.

... the ... of ...

1. Mitchell County, N. Carolina stated that two names were recorded with instructions to make sure to handle them to the credit of the fund. These names were recorded in the 1945-1946 year.

and credited to his account as received on December 31, 1967, was \$100.00.

The amount of \$100.00 was also credited to his bank and he was notified by mail on January 1, 1968.

Source: *Journal of the American Statistical Association*, 1997, Vol. 92, No. 439, pp. 1023-1032.

was notified by telephone on December 14, 1950, that the above named party had been placed under arrest and was being held in the County Jail. The party was released on December 15, 1950, and was advised that the party was being released on bond. The party was advised that the party was being released on bond and was to appear in court on December 16, 1950.

100-443887-100

sequently Mr. Howard did draw checks against this fund. Before these checks cleared and were returned to the Gary-Wheaton Bank, the Columbus State Bank of Columbus, Mont., failed. The American Express Company notified the Gary-Wheaton Bank of the failure of the Columbus State Bank, and ordered it to stop payment against this fund.

The Gary-Wheaton Bank complied with the notice received from the American Express Company, and refused to pay the checks that Mr. Howard had drawn against this fund. After awaiting the outcome of negotiations among the parties for some time, the Gary-Wheaton Bank filed its bill of interpleader herein, for the purpose of having the ownership of the fund judicially determined. It made all parties concerned defendants to its bill. J. Mitchell Howard, W. H. Jones, W. S. Acton, and the American Express Company filed their answers. The trial court rendered judgment in favor of the defendant in the interpleader, J. Mitchell Howard, and found that he was entitled to the fund in question, and ordered the clerk of the court to pay the same over to him. The American Express Company, as appellant, prosecutes this appeal from the judgment of the trial court, naming J. Mitchell Howard, W. H. Jones and W. S. Acton as appellees.

Appellant urges for reversal, bad faith on the part of appellees, claiming that Jones and Acton knew that the Columbus State Bank was insolvent at the time the travelers cheques were procured, that the bank was unable to settle for the certificate of deposit in cash and that this was the reason appellees took the travelers cheques; also that the Columbus State Bank lacked authority to issue the cheques in the manner in which they were issued; that the cheques were never paid for by Jones; and that the trial court misconceived the law governing the facts in the case.

The evidence shows that Jones upon moving to the city of Columbus in May 1917, became personally acquainted with the officers of the Columbus State Bank. He commenced doing his banking business

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United States regarding the activities of the various groups and individuals mentioned in the report.

[illegible]

The evidence shows that Brown was active in the left in
Columbia in May 1937, became personally acquainted with the witness
at the Columbia Youth Hall. He remained active in further business

with this bank at that time, and continued to transact his banking business with this bank after moving to the city of Lewistown in November 1930, and continued to do so until the bank closed. The evidence shows that Jones carried his checking account at the Columbus State Bank during all this time, that he had another certificate of deposit in this bank besides the one used to purchase the travelers cheques, and that his mother had a certificate of deposit in this bank, all of which were in existence at the time the bank closed. There is no evidence herein showing that Jones made any effort to withdraw any of these other funds from this bank before its failure. The evidence further shows that Jones had a talk with Logan, vice president of the Columbus State Bank, in which he told him that he was expecting to need the money represented by this certificate of deposit. He mentioned this to Mr. Logan several times and he also mentioned it to Mr. Anderson, who was second vice president and cashier of the bank. Following these conversations, and after the agreement was made with Acton for the loan, Jones wrote the bank to the effect that he expected to use this money, and received in reply thereto, the following letter.

"Columbus State Bank
Victor Herington, President
John Logan, Vice President
K.A.R. Anderson, V.P. and Cashier
Columbus, Montana, Nov. 18, 1930.

Mr. W. H. Jones,
Lewistown, Mont.
Dear Bill:

Karl showed me your letter in which you stated that you might use a part or all of your C.D. to venture into the cattle game. We will be very glad of course to have you carry a part of it with us, however, if you have to use it for other purposes, we want to thank you for the nice deposit you carried with us for years and to assure you that we appreciate it.

With best personal regards, I remain,

Very truly yours,
(Signed) Jno. Logan
Vice President.

The Pioneer Bank of Stillwater County."

The arrangement first reached by Jones and Acton was that Jones would mail in and surrender to the Columbus State Bank his certificate of deposit for \$4410 and draw his check for that amount in favor of W. S. Acton. Mr. Acton was to mail this check to the Columbus State Bank and direct them to issue a draft therefor, payable to the Gary-Wheaton Bank at Wheaton, Ill., and to mail such draft to said bank with instructions to deposit the same to the credit of J. Mitchell Howard. Following these arrangements between Jones and Acton, Jones wrote the following letter to the Columbus State Bank, enclosing the certificate of deposit.

"Cooperative Extension Work
in
Agriculture and Home Economics
State of Montana
Montana State College
U. S. Department of Agriculture and
Fergus County Cooperating Extension Service
County Agent Work
Lewistown, Montana,
Nov. 23, 1930.

Dear John:

I was sorry to learn of Pete's sudden death. Yes, he was a good old Indian and he will be greatly missed, especially by the poultry Ass'n. I presume we all must take such a journey sooner or later.

Was interested to know that the weather was favorable for livestock. We cannot truthfully make such a statement. There has been lots of snow and winter in the Basin this fall and our feed is none too plentiful for a long winter.

A number of our men are feeding cattle, lambs and hogs on the cheap wheat and other grain. Some 30 carloads are being fattened. Should like to see your hogs when they are ready for market. Are any lambs being fed?

John am enclosing my C.D. and have given check to my livestock man for both principal and interest or \$4410.00. Was pleased this would not inconvenience you. I shall still continue to do some little business with you. Be assured I have enjoyed my relationship with you both in a social and business way.

Sincerely,
(Signed) W.H. Jones."

There would still be and continue to be a large number of people of doubtful loyalty in the United States, and it is the duty of the Government to take such steps as may be necessary to protect the national defense against such persons.

1. The first part of the document is a list of names and addresses, including "Mr. J. H. Smith, 123 Main St., New York, N. Y." and "Mr. J. H. Smith, 123 Main St., New York, N. Y."

[illegible]

1950年 1月 1日 (星期日)

The above arrangement between Jones and Acton regarding the making of the loan and the surrender of the certificate of deposit, and the issuance of the check thereon, were carried out, and Acton mailed the check to the Columbus State Bank, directing it to issue a draft and forward same as aforesaid. Mr. Acton also wrote the Gary-Wheaton Bank advising it of this transaction and directing it to deposit the draft when received to the credit of J. Mitchell Howard. Following this, Acton received notice that the draft had not reached the Gary-Wheaton Bank. Mr. Jones telephoned to Mr. Logan of the Columbus State Bank about the delay in the receipt of the draft by the Gary-Wheaton Bank. Mr. Logan stated that the matter had been taken care of and the draft had been sent, but must have been lost in the mail, and offered to make settlement in any manner the parties desired.

Acton and Howard needed the money badly and were anxious to have the loan become available to them at the earliest possible moment. Acton and Jones made a trip from Lewiston to Columbus by way of Billings, Mont. At this city Jones by chance, met Mr. Anderson, vice president and cashier of the bank. In discussing the state of business affairs in Stillwater county, where Columbus is located, Anderson said that things were good, and told Jones that the bank was in excellent condition, that the examiner had visited the bank only a few days before and found it to be in number one, sound condition.

Upon arrival in Columbus, Jones and Acton called at the bank where they met Mr. Logan, who stated to them that the certificate of deposit had been properly received, and that the check to Mr. Acton for \$4410 had also been received, and that a draft therefor had been sent as directed, but lost in the mail. He stated that he would be glad to make settlement for the certificate of deposit in any manner desired. Jones advised Logan that Acton and Howard were anxious to get the money and that he would therefore like to dispose of it without further delay. Mr. Logan replied that this was all right and could be done and stated that the draft already issued would be

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cancelled. Jones thereupon stated that if satisfactory to Mr. Logan, he would take travelers cheques for the money. Mr. Logan stated that this was agreeable and they retired to an inner office room where Logan brought the cheques to be signed. Mr. Anderson and the other employees of the bank saw this transaction. The cheques were properly filled out and delivered by Logan to Jones.

Appellant insists that Jones asked for the cash and upon being unable to procure the cash, agreed to take travelers cheques, and appellant asked of Jones in this regard, the following question, "What did Mr. Logan tell you about having to go to Helena before he could settle up with you?" To which he answered, "He said, Bill, in order to give you the cash for the \$4410, you would have to wait for a couple of days until I went up to Helena and secured a little more money, and right then is where I said, I am not asking for the cash, John, just so we can get this matter straightened out now, and I think it was right then and there that I suggested travelers cheques, and he OK'd them, I did not take it from Mr. Logan that he did not have more than \$4410 in the bank at the time; I took it from a banking standpoint that he preferred not to take all of his cash reserve or quite a lot of it for that account and that he could get the cash by making this trip to Helena, if I demanded or wanted the cash."

Jones states positively that he did not ask for anything except travelers cheques, and denies that he asked for bonds, money or anything else. He states that he had used travelers cheques before and always found them good. Bad faith on the part of Jones and Acton is urged by appellant, and appellant insists that these parties were chargeable with knowledge of such facts as to put them upon notice, that the bank was insolvent at the time the travelers cheques were procured. Jones denies that Logan stated that they did not have enough cash to pay this certificate of deposit, but he says that Logan in the conversation said that country banks did not carry a big surplus of cash on hands, and offered in case Jones desired cash, to obtain the

[illegible]

same from Helena.

Jones had had a personal acquaintance with the officers of this bank since 1917 and since that time had done his banking business at their bank. From the above letters, it is apparent that his acquaintance with these men was a personal one as well as a business acquaintance. Nothing appears to show knowledge on the part of Jones and Acton that the Columbus State Bank was insolvent at the time Jones surrendered his certificate of deposit and purchased these travelers cheques. Acton did not know these people and had little, if any, conversation with any of them. Howard lived in Wheaton, Ill., and was also a stranger to the bank. Appellant does not deny that the bank was its regular constituted agent with authority to issue such cheques. Acton and Howard could have no knowledge regarding the solvency of the bank because they were strangers to it. Jones had known the officers of the bank for many years. It is evident that a personal friendship existed between Jones and these men as well as a business relationship. These men had all the facts and information as to the condition of this bank within their own knowledge and within their own breast. Under such circumstances, where the utmost trust and confidence is reposed by the depositor, and with those in whom he reposes such confidence, using every device to maintain such confidence and to conceal the truth, bad faith can hardly be imputed to such depositor. It is unnatural to doubt and suspect those who should be our protectors.

A customer of a bank who has sufficient credit at said bank by way of money on deposit therein, and who desiring to purchase travelers cheques, and who surrenders to said bank a sufficient portion of his deposit to pay for such travelers cheques, at a time when the bank is open and doing business, and without any fraud or bad faith on the part of such customer, should be deemed to be an innocent holder for value and entitled to protection accordingly. We do not believe that it can be urged that before a customer of a bank can purchase travelers cheques, that he must first withdraw the actual cash from

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such bank, and then at the next moment turn such cash over to the same bank, in order to legally complete the purchase transaction. This would be a most unusual rule and one wholly without the usual and customary methods of modern business transactions.

When the customer possesses sufficient funds to his credit at the bank, and the bank is the undisputed agent of appellant, and then open in the usual and customary manner, conducting and transacting a general banking business, and the customer without bad faith on his part, purchases travelers cheques and surrenders his credit to that extent at such bank, he should be deemed to have parted with a valuable consideration for the purchase of such cheques. Had Jones secured the cash upon the certificate of deposit and delivered the cash to Logan at the bank at the time of purchasing these cheques, the situation would have been the same. The purchaser of such cheques when he has paid for same to the agent who is authorized to sell them, should not be required to see that such agent accounts to its principal for the money. When Jones surrendered his certificate of deposit, this was to all effects a payment the same as though he had drawn his check against a general deposit in the bank. We do not believe that it can be fairly said that in the purchase of such cheques, when the customer has sufficient funds to his credit in the agent bank, that he must first draw out the cash and then return the cash to the same bank for the cheques, or that he is chargeable with the duty to see that the agent bank properly accounts for such money to its principal before the cheques shall be valid. These cheques had passed out of the hands of Jones at the time of their deposit in the Cary-Wheaton Bank.

Appellees complain because the trial court did not require the Cary-Wheaton Bank to pay interest on this fund. The evidence does not show that the Cary-Wheaton Bank was guilty of any vexatious delay. It had nothing to do with the money being deposited therein, and when it appeared that the parties could not settle their dispute,

each bank, and each of the bank owners was given a copy of the
same bank, in order to keep it ready for the various transactions.
This would be a great advantage to the bank, and the bank
the customary methods of modern business transactions.

When the bank owners decided to open a bank, they
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said bank came into court with its bill of interpleader, to have the ownership of the fund judicially determined.

The chancellor heard the evidence and was in a much better position than this court to form an opinion of the weight to be given to the testimony. Where the chancellor makes a finding of fact from conflicting testimony, his finding will not be disturbed on review unless it is clearly against the preponderance of the evidence. *Schrader v. Schrader* 298 Ill. 469; *Fabrice v. Von der Brelie* 190 Ill. 460; *Coari v. Olsen* 91 Ill. 273. Our examination of the record confirms the conclusions reached by the chancellor.

The judgment of the circuit court of Du Page county is affirmed.

Judgment affirmed.

It has been also noted with the will of the individual, to be

• The proposed schedule must be approved by the

The collection of the following items is being made:

THIS IS TO CERTIFY THAT THE ABOVE NAMED PERSON HAS BEEN RECEIVED BY THE

For the purpose of this study, the following data were collected:

1971-1972

It is hereby stated the two divisions of the

1. The first of these is the fact that the Commission has not yet received any information from the Government of the United Kingdom regarding the progress of its investigation into the alleged involvement of British intelligence agencies in the assassination of Dr. Martin Luther King.

1. The first group of people who are not allowed to enter the country are those who are considered to be a threat to national security. This includes anyone who is suspected of being involved in terrorism, espionage, or other activities that could harm the country.

... ..

12-11-60

1997

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

143 H
Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 637²

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1932.

GEORGE HOLLENBECK, (Plaintiff)
Plaintiff in Error,

vs.

Writ of Error to
Circuit Court,
LaSalle County.

JAMES E. BENNETT, Frank A. Miller,
Frank J. Saibert and Frank F.
Thompson, Co-Partners Doing
Business as James E. Bennett &
Company, and Frank LaVelle,
(Defendants)
Defendants in Error.

WOLFE -- P.J.

George Hollenbeck, plaintiff in error, started suit in the Circuit Court of LaSalle County, Illinois, against James E. Bennett, Frank A. Miller, Frank J. Saibert and Frank F. Thompson, co-partners doing business as James E. Bennett & Company, and Frank LaVelle. Frank LaVelle had charge of the office, located at Streator, Illinois. He was the manager and had complete control of the office and had several employees under him. Hollenbeck claims he had lost in the aggregate \$25,000.00 through speculation and gambling with the Bennett Company and LaVelle. Trial was had before a jury who found LaVelle not guilty, but found all of the partners of James E. Bennett & Company liable. Hollenbeck entered a motion for a new trial as against LaVelle. This motion was overruled and the Court of his own motion dismissed the case against the Bennett Company. Hollenbeck brings the case to this Court on appeal.

It is conceded that the firm of James E. Bennett & Company is a partnership which consists of a number of persons all of whom are residents of the County of Cook. LaVelle was a resident

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1922.

GEORGE HOLLENBECK, (Plaintiff)
Plaintiff in Error,

vs.

Writ of Error to
Circuit Court,
Lassalle County.

JAMES E. BENNETT, Frank A. Miller,
Frank J. Gilbert and Frank F.
Thompson, Co-Partners Doing
Business as James E. Bennett &
Company, and Frank Lavelle,
(Defendants)
Defendants in Error.

WITHE --- P. 7.

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Circuit Court of Lassalle County, Illinois, against James E. Bennett,

Frank A. Miller, Frank J. Gilbert and Frank F. Thompson, co-defendants

doing business as James E. Bennett & Company, and Frank Lavelle.

Frank Lavelle had charge of the office, located at Streator,

Illinois. He was the manager and had complete control of the

office and had several employees under him. Hollenbeck claims

he had lost in the aggregate \$25,000.00 through speculation and

complicity with the Bennett Company and Lavelle. Trial was had and

for a jury who found Lavelle not guilty, but found all of the

partners of James E. Bennett & Company liable. Hollenbeck entered

a motion for a new trial as against Lavelle. This motion was

overruled and the Court of his own motion entered the case

against the Bennett Company. Hollenbeck brings the case to this

Court on appeal.

It is conceded that the firm of James E. Bennett & Company

is a partnership which consists of a number of persons all of

whom are residents of the County of Cook. Lavelle was a resident

of Streator in LaSalle County. The suit was started in LaSalle County and service had upon LaVelle. Summons was issued for the Bennett Company in Cook County. Service was had upon all of the partners in that county. The Bennett Company filed a plea to the jurisdiction of the Court to which the plaintiff interposed a demurrer. This demurrer the Court sustained. The Bennett Company elected to stand by their plea and a default was taken against them.

The verdict of the jury is wholly inconsistent. LaVelle, it is conceded, did or superintended all the work at the Streator office. He handled all of the transactions for the Bennett Company with Hollenbeck. The Bennetts could not possibly be guilty of participating in a gambling transaction unless LaVelle was guilty. None of the individual partners of James E. Bennett & Company were personally present or took part in any of the transactions between Hollenbeck and their agent, LaVelle. LaVelle was a resident of LaSalle County and the suit evidently was started in that County for the purpose of complying with the law, so as to get service on the local resident, and then compel the nonresidents to appear in that county. The suit could not be maintained against the nonresident defendants unless the local defendant, LaVelle, was found guilty.

Appellees contend that there is no inconsistency in the verdict of the jury finding in favor of the defendant, LaVelle, and against the defendants comprising the partnership of the James E. Bennett & Company, because the evidence differed as to these defendants. Also that there can be a recovery only from the winner and that LaVelle was not a party to any of the plaintiff's contracts and did not win any money from the plaintiff, Hollenbeck. The case of Pearce vs. Foote, 113 Ill. 338,

of Attorney in LaSalle County. The suit was entered in LaSalle County and service was made upon Lavelle. Lavelle was named for the Bennett Company in Cook County. Service was made upon all of the partners in that county. The Bennett Company filed a plea to the jurisdiction of the Court to which the plaintiff introduced a demurrer. This demurrer the Court sustained. The Bennett Company elected to stand by their plea and a default was taken against them.

The verdict of the jury is wholly inconsistent. Lavelle, it is conceded, did not superintend all the work at the Stratton office. He handled all of the transactions for the Bennett Company with Hollenbeck. The Bennett could not possibly be guilty of participating in a gambling transaction unless Lavelle was guilty. None of the individual partners of James E. Bennett & Company were personally present or took part in any of the transactions between Hollenbeck and their agent, Lavelle. Lavelle was a resident of LaSalle County and the suit evidently was started in that County for the purpose of complying with the law, so as to get service on the local resident, and that is what the non-residents to appear in that county. The suit could not be maintained against the non-resident defendants unless the local defendant, Lavelle, was found guilty.

Appellants contend that there is no inconsistency in the verdict of the jury finding in favor of the defendant, Lavelle, and against the defendants comprising the partnership of the James E. Bennett & Company, because the evidence differed as to these defendants. Also that there can be recovery only from the firm and that Lavelle was not a partner in any of the plaintiff's contracts and did not take any part in the plaintiff, Hollenbeck. The case of *Parce v. Poote*, 117 Ill. 325,

involves similar facts and principles of law as the case we are now considering and the Court in this opinion says: (page 238) "The suggestion that Hooker & Company merely acted as the agents for plaintiff in these unlawful transactions, may be rejected at once as having nothing in its support. There is and can be no such thing as agency in the perpetration of crimes or misdemeanors, or, indeed, in the doing of any unlawful act. All persons actively participating are principals. Treating all the parties engaged as principals, it is immaterial to which one the money or property lost was in fact paid or delivered,-- whether to Hooker & Company, or to any of the parties on the board of trade with whom they may have made fictitious contracts, and lost,-- and paying to either principal is, in law, paying to the "winner." It is our opinion that under the law and the facts as presented in this case, that LaVelle was a winner, and the verdict is inconsistent.

Plaintiff in error insists that the defendants in error instructions number 4, 5 and 6 are not a correct statement of the law and should not have been given to the jury. We find nothing particularly wrong with the instruction number 5, but a similar instruction as number 4 and 6 was criticised in the case of *The People vs. Cochran*, 313 Ill. 509, and the Court said: "It should not have been given." An instruction to the jury as to what the presumption of law is upon a question of a disputed fact is extremely likely to mislead the jury and should not be given. The giving of these instruction is not reversible error, but if the case is retried such instructions should be omitted.

The evidence discloses that between the dates of December, 1924 and the Spring of 1925, that Hollenbeck purchased from the

involved in this case and the principle of it is the same as
the one concerning the law in this case. (page 233) "The
as the agent for plaintiff in these material transactions,
be rejected at once as having nothing in its support. There
is and can be no such thing as a right to the possession of
crimes or misdemeanors, or, indeed, in the doing of any
law. All persons actively participating are principals.
Further, all the parties engaged as principals, it is immaterial
to which one the money or property lost was in fact paid or
delivered,-- whether to Hooker & Company, or to any of the
parties on the board of trade with whom they may have made
fictitious contracts, and lost.-- and paying to either principal
is, in law, paying to the "winner." It is the opinion that
under the law and the facts as presented in this case, that
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Plaintiff in error insists that the statement in error
instructions number 4, 5 and 6 are not a correct statement of
the law and should not have been given to the jury. He insists
nothing particularly wrong with the instructions number 4, but
a similar instruction as number 5 and 6 was omitted in the
case of The People vs. Jackson, 111 Ill. 502, and the court
said: "It should not have been given." An instruction to
the jury as to what the presumption of law is upon a question
of a disputed fact is extremely likely to mislead the jury and
should not be given. The giving of these instructions is not
reversible error, but in the case of a retrial such instructions
should be omitted.
The evidence discloses that between the dates of December,
1924 and the spring of 1925, that defendant received from the

James E. Bennett Company through the defendant, LaVelle, 564,000 bushels of wheat, the whole transaction amounting to about \$1,009,000.00; that Hollenbeck was a man of limited means and owned property of a probable value of less than \$5,000.00. The evidence is conflicting as to whether LaVelle knew the financial ability of Hollenbeck, but it strongly tends to show that he did have knowledge of such facts. Hollenbeck testifies positively, that all of his dealings were gambling transactions, that he did not expect at any time, on any of his deals, to actually receive the grain, but settlements were to be made on the rise or fall of the market. LaVelle, on the other hand, testified that he expected to deliver this immense quantity of wheat to Hollenbeck. Considering all these facts, we think that the judgment of the jury was wholly inconsistent and that the trial Court erred in not sustaining the motion of the plaintiff in error for a new trial, and it was also error to dismiss the suit as to the members of the partnership of James E. Bennett Company.

The judgment of the Circuit Court of LaSalle County is hereby reversed and the cause remanded to that Court, with instructions to set aside the judgment dismissing the case as to the defendants, James E. Bennett, Frank A. Miller, Frank L. Saibert, and Frank F. Thompson, and to set aside the judgment and order dismissing the case as to the defendant, Frank LaVelle; and to set aside the order denying plaintiff's motion; to set aside the verdict, and for a new trial; and to set aside the said verdict; and to grant the plaintiff a new trial in this case.

Reversed and remanded with instructions.

James F. Bennett Company through the defendant, Lavelle, 584,000 bushels of wheat, the whole transaction amounting to about \$1,000,000.00; that Hollenbeck was a man of limited means and owned property of a probable value of less than \$2,000,000.00. The evidence is conflicting as to whether Lavelle knew the financial ability of Hollenbeck, but it strongly tends to show that he did have knowledge of such facts. Hollenbeck testifies positively, that all of his dealings were gambling transactions, that he did not expect at any time, on any of his deals, to actually receive the grain, but settlements were to be made on the rise or fall of the market. Lavelle, on the other hand, testified that he expected to deliver this immense quantity of wheat to Hollenbeck. Considering all these facts, we think that the judgment of the jury was wholly inconsistent and that the trial Court erred in not sustaining the motion of the plaintiff in error for a new trial, and it was also error to dismiss the suit as to the members of the partnership of James F. Bennett Company. The judgment of the Circuit Court of Lavelle County is hereby reversed and the cause remanded to that Court, with instructions to set aside the judgment dismissing the case as to the defendants, James F. Bennett, Frank A. Miller, Frank L. Gilbert, and Frank F. Thompson, and to set aside the judgment and order dismissing the case as to the defendant, Frank Lavelle; and to set aside the order denying plaintiff's motion; to set aside the verdict, and for a new trial; and to set aside the said verdict; and to grant the plaintiff a new trial in this case.

Reversed and remanded with instructions.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and
for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause.
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT

To The February Term, A. D., 1933

GEORGE L. SCHEIN,
Plaintiff in Error

vs.

THE ESTATE OF JOHN DAILEY,
Deceased,
Defendant in Error

Error to the
Circuit Court,
Peoria County,
Illinois.

WOLFE -- P. J.

George L. Schein, plaintiff in error, filed a claim in the Probate Court of Peoria County against the estate of John Dailey, deceased, for attorney's fees in the amount of \$3,000.00. The claim was based upon an alleged verbal promise that John Dailey made in his lifetime to pay for the same. At the time the alleged promise was made John Dailey was chairman of the Joint Legislative Revenue committee, which had been created by an Act of the Illinois General Assembly and approved July 7, 1927. The claimant alleged that the services he rendered were on behalf of John Dailey, personally, and not on behalf of the legislative committee. The claim filed is for services rendered from July 1928 to September 1928. The committee began to function in Chicago about July 1, 1928. John Dailey died July 5, 1929.

The act of the General Assembly creating this committee, provided that the committee was to consist of nine members, two to be chosen from the Senate, two from the House of Representatives and five to be selected by the Governor, from the citizens of the State. It was its duty and had power to make a full investigation of the

RECEIVED

2/10/12 2/10/12

To the Honorable Secretary of the Navy

[illegible]

• 8V

THE STATE OF TEXAS,
County of _____
I, _____, Clerk of the Court,
do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears from the records of the Court.

16. — — — — —

Declassify on: OADR, 10-16-89

was based upon an alleged report that the subject was in the area of the ...

difficult to say for the time being.

made John Deley and chairman of the Anti-Defamation League.

and a few, before a fine

entire revenue system, and of the methods employed in assessing property for the purpose of taxation throughout the State of Illinois; for such purposes they might subpoena witnesses, administer oaths and compel the production of books and papers. It was their duty to study the revenue laws and methods of assessing property in other states, and make report of the results of their investigation to the Fifty-sixth General Assembly with such recommendations for revision of the revenue laws of this State as will in their opinion bring about a fairer method of assessing property and equalizing the tax burdens of the State. There was appropriated to said legislative revenue committee the sum of \$25,000.00 to be used in defraying the expenses of the committee in carrying out the provisions of the act, None of the members of said legislative revenue committee were to receive any compensation, but each was to be reimbursed for his actual and necessary expenses. Said committee had the power to maintain an office and employ such clerical and other assistance as should in their judgment be necessary to properly carry out the purposes of the investigation, and should keep an accurate record of all expenditures and make full report thereof to the Fifty-sixth General Assembly.

The case was heard in the Probate Court of Peoria County and the claim disallowed. The claimant took an appeal to the Circuit Court of the same county, and after the plaintiff had introduced his evidence in support of the claim in that Court, the Court found in favor of the defendant's estate and disallowed the claim. The original claimant George L. Schein, brings the case to this Court for review on a writ of error.

The first question presented to this Court is: Did the evidence establish the facts that John Dailey in his lifetime employ the plaintiff in error, George L. Schein, to represent him personally, and was obligated to pay for his services, or was George L. Schein employed to represent the committee and John Dailey in their official capacity. If John Dailey in his lifetime did employ the said George L. Schein to represent him personally, then the question arises:

entire revenue system, and of the system employed in assessing property for the purpose of taxation in the State of Illinois; for such purposes that it is necessary to make a study of the system and cancel the operation of such system. It is also necessary to study the revenue laws and methods of assessment in other States, and make report to the committee of findings and recommendations. Fifty-sixth General Assembly with such recommendations for the revision of the revenue laws of this State as will in your opinion result in a fairer method of assessing property and equalizing the tax burden of the State. There was recommended to this legislative revenue committee the sum of \$25,000.00 to be used in defraying the expenses of the committee in carrying out the provisions of the act, and of the members of said legislative revenue committee to be retained by the State, but also to be a reimbursement for the actual and necessary expenses. Said committee has the honor to maintain an office and employ such clerical and other assistance as may be necessary to properly carry out the purposes of the legislation, and should keep an accurate record of all expenditures and bills report thereon to the Fifty-sixth General Assembly.

The case was heard in the Circuit Court of Cook County, Illinois, the claim disallowed. The plaintiff sought to recover for the use of the same country, and after the plaintiff had introduced the same in support of the claim in that court, the court ruled in favor of the defendant's estate and disallowed the claim. The plaintiff claimed George L. Schain, but the case is now pending in the Circuit Court of Cook County, Illinois, on a writ of error.

The first question presented in this case is: Did the plaintiff establish the fact that the same was a life estate in the plaintiff in error, James L. Schain, or was it a fee simple, and was obligated to pay the same interest, as was James L. Schain, employed to represent the defendant and James Schain as an official capacity. If the latter is the case, the plaintiff is not entitled to recover, and the defendant is entitled to recover, and the plaintiff is not entitled to recover.

Was there any consideration for the promise to pay for the employment?

The act of the legislature in creating this committee appropriated \$25,000.00 for use in defraying the expenses of the committee in carrying on their work. Individual members of the committee were to receive no compensation for their work aside from their personal expenses. Before an officer or a chairman of the committee can be held personally liable on contracts entered into by him, within the scope of his authority, the contract creating such liability must clearly show that such officer or chairman clearly intended to assume a personal liability for such services. Black vs. Brown, 196 App. 508. The Astoria etc. vs. U.S. Shipping, etc., 295, Fed. 415.

The record does not show that George L. Schein ever requested John Dailey in his lifetime to pay this bill, although the services are purported to have been rendered nearly a year before Mr. Dailey's death. Mr. Schraidiski, in testifying, said Mr. Dailey told George L. Schein relative to the money appropriated by the legislature, that 'We will take care of you, George.' This strongly indicating that Mr. Dailey did not recognize a personal responsibility in regard to this employment.

After a review of all the evidence in the case, we are of the opinion that the claimant did not establish a personal liability of the estate of John Dailey, deceased, to that degree of proof as required by law.

Even if the plaintiff in error had proven a personal contract between John Dailey and George L. Schein, there was no consideration for any promise on the part of Mr. Dailey to support the contract. We find no reversible error in the case and the judgment of the Circuit Court of Peoria County is hereby affirmed.

Judgment affirmed.

Was there any consideration for the purchase of the land?

Employment?

The fact of the employment is stated in the report.

Approximately \$25,000.00 for use in developing the lands of the

committee in carrying on their work. Individual members of the

committee were to receive no remuneration for their work.

from their personal expenses. There was no salary or a stipend of

the committee can be held personally liable for any expenses incurred

into by him, within the scope of his activity, the committee

creating such liability must clearly show that such of them in

chairman clearly intended to secure a personal liability for such

see Wees. Black vs. Brown, 192 U.S. 305. The liability for such

and other, etc., 292, Fed. A.D.

The record does not show that the committee was organized

John Wiley in his lifetime as was stated, although the committee

one purported to have been created only after his death.

death. Mr. Schindler, in testimony, said that the committee

L. Schindler relative to the committee was not organized, and

'he will take care of you, mother.' This committee was organized

Mr. Bailey did not consider a committee personally liable for

this employment.

After a review of all the evidence in this case, the court

opinion that the committee did not exist as a legal entity

the estate of John Bailey, deceased, as the executor of the

required by law.

Even if the committee existed and entered a contract with

between John Bailey and the committee, there was no consideration

for any promise of the part of the committee to execute the contract.

He finds no reversible error in the court's judgment of the

disposit of the case is hereby affirmed.

Respectfully submitted.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 637

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

February Term, A. D., 1933.

CHARLES JOHNSON
(Plaintiff) Appellee

vs.

Appeal from
Circuit Court,
Will County.

EDWARD A. MUELLER
(Defendant) Appellant

WOLFE -- P. J.

The appellee, Charles Johnson, filed a suit in the Circuit Court of Will County, charging the appellant, Edward A. Mueller with negligently leaving his automobile on one of the paved roads in said county; and because of the appellant's negligence, a car in which the appellee was riding crashed into the rear end of the appellant's car and the appellee was injured.

The first count of the declaration is what is commonly known as a general negligence count. The second count charges the defendant with negligently leaving his automobile on the hard road contrary to the statute. The third count charges the defendant with negligently leaving his automobile on the hard road and failure to have a tail light on the same, contrary to the statute. Each of said counts state that at and just prior to the collision the plaintiff was in the exercise of due care for his own safety. To this declaration the defendant filed a plea of the general issue. The case went to trial before a jury who found in favor of the plaintiff and assessed his damages at the amount of \$1,375.00. The defendant brings the case to this Court on appeal to review this judgment.

At approximately 11:00 p.m., on the 16th day of January, 1930,

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

February Term, A. D., 1933.

CHARLES JOHNSON
(Plaintiff) Appellee

vs.

EDWARD A. MUELLER
(Defendant) Appellant

WOLF -- P. 1.

Appeal from
Circuit Court,
Will County.

The appellee, Charles Johnson, filed a suit in the Circuit Court of Will County, charging the appellant, Edward A. Mueller with negligently leaving his automobile on one of the paved roads in said county; and because of the appellant's negligence, a car in which the appellee was riding crashed into the rear end of the appellant's car and the appellee was injured.

The first count of the declaration is what is commonly known as a general negligence count. The second count charges the defendant with negligently leaving his automobile on the hard road contrary to the statute. The third count charges the defendant with negligently leaving his automobile on the hard road and failure to have a tail light on the same contrary to the statute. Each of said counts state that at and just prior to the collision the plaintiff was in the exercise of due care for his own safety. To this declaration the defendant filed a plea of the general issue. The case went to trial before a jury who found in favor of the plaintiff and assessed his damages at the amount of \$1,575.00. The defendant brings the case to this Court on appeal to review this judgment.

At approximately 11:00 p.m., on the 18th day of January, 1930,

Edward A. Mueller left the village of Manhattan for his home, driving his automobile on a two-lane concrete state highway. He lived a distance of approximately 4 miles southwest of Manhattan. Mr. Mueller had lived at the same place for a period of 20 years or more and had driven to and from his home to the village of Manhattan approximately once a week during the entire time. As he was driving home this night his car began to overheat. The engine got very hot. Steam came from the overflow pipe in the radiator. He stopped his car directly in the line of traffic in which he had been traveling, discovered the water was frozen in the radiator and took a laprobe and placed it over the radiator for the purpose of thawing it out. While the car was parked on the highway, the car in which the appellee was riding, which was driven by his son, crashed into the rear end of Mr. Mueller's car and the appellee was injured.

At the place where the appellant's car was standing at the time of the injury to the appellee, there was a dirt shoulder approximately 7 feet wide on the side of the paved portion of the road. The evidence is conflicting as to how much snow was on the shoulder of the road, and whether it would have been practical for the appellant to have driven his car off the road onto the shoulder when he stopped. The evidence is also conflicting as to whether there was a tail light burning on Mueller's car while it was standing on the road at the time of the collision.

The trial Court and the jury heard the witnesses testify relative to the amount of snow that was on the shoulder of the road and as to whether the appellant's car did have a tail light burning at the time of the injury to the appellee. These are questions of fact to be decided by the jury, and unless this Court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this Court, on a review of the evidence, might reach a different conclusion from that of the trial Court and jury. We have reviewed the evidence and it is our opinion that it sustains the contention of the appellee ~~sustains the~~

Edward A. Mueller left the village of Manhattan for his home, driving his automobile on a two-lane concrete state highway. He lived a distance of approximately 4 miles southwest of Manhattan. Mr. Mueller had lived at the same place for a period of 20 years or more and had driven to and from his home to the village of Manhattan approximately once a week during the entire time. As he was driving home this night his car began to overheat. The engine got very hot. Steam came from the overflow pipe in the radiator. He stopped his car directly in the line of traffic in which he had been traveling, discovered the water was frozen in the radiator and took a jack and placed it over the radiator for the purpose of thawing it out. While the car was parked on the highway, the car in which the appellee was riding, which was driven by his son, crashed into the rear end of Mr. Mueller's car and the appellee was injured.

At the place where the appellant's car was standing at the time of the injury to the appellee, there was a dirt shoulder approximately 7 feet wide on the side of the paved portion of the road. The evidence is conflicting as to how much snow was on the shoulder of the road, and whether it would have been practical for the appellant to have driven his car off the road onto the shoulder when he stopped. The evidence is also conflicting as to whether there was a tail light burning on Mueller's car while it was standing on the road at the time of the collision.

The trial court and the jury heard the witness testify relative to the amount of snow that was on the shoulder of the road and as to whether the appellant's car did have a tail light burning at the time of the injury to the appellee. These are questions of fact to be decided by the jury, and unless this court can say that the verdict is manifestly against the weight of the evidence, we would not be justified in reversing the case for the reason that this court, on a review of the evidence, might reach a different conclusion from that of the trial court and jury. We have reviewed the evidence and it is our opinion that it sustains the contention of the appellee.

~~contention of the appellee~~, that at the time of the collision of the cars there was no tail light burning on the appellant's car, and the snow on the shoulder of the road was not deep enough to prevent the appellant from driving his car off of the slab onto the dirt shoulder of the road.

The appellant insists that the trial Court erred in giving certain instructions to the jury on behalf of the plaintiff, and to the modification by the Court of some of the defendant's instructions. It is our opinion that the Court did not err in giving or modifying the instructions. The criticisms offered by the appellant to these instructions is purely technical, and the instructions as a whole fairly presented the law of the case.

Francis Johnson was called as a witness on behalf of the appellee. He was riding with his father and brother in the car at the time his father was injured. This witness detailed how the accident occurred. He told of the injuries to his father; and that they took the father and Mr. Mueller to the hospital. This question was then asked the witness: "On the trip from the Brannan Home to the hospital, did Mr. Mueller say anything about the accident?" He answered, "He would settle it up and make everything" -- Mr. Faulkner, attorney for the defendant, said, "I object to that. It is not a part of the res gesta." The Court sustained the objection. At the request of Mr. Faulkner, the Court struck the same from the record and instructed the jury to disregard this testimony. These questions and answers were repeated and the Court again struck the testimony from the record and instructed the jury to disregard the evidence. The appellant now insists that this was reversible error on the part of the appellee in bringing before the jury, an offer on the part of the appellant to compromise for the damage that the appellee had sustained. In an early part of the witness' testimony, this question was asked the witness: "What did you say to Mr. Mueller on that occasion." He answered, "I asked him what he was doing there on the road."

...that at the time of the collision
of the cars there was no tail light burning on the appellant's car,
and the snow on the shoulder of the road was not deep enough to pre-
vent the appellant from driving his car off of the sidewalk onto the
dirt shoulder of the road.

The appellant insists that the trial court erred in giving
certain instructions to the jury on behalf of the plaintiff, and to
the modification by the Court of some of the defendant's instructions.
It is our opinion that the Court did not err in giving or modifying
the instructions. The criticisms offered by the appellant to these
instructions is purely technical, and the instructions as a whole
fairly presented the law of the case.

Francis Johnson was called as a witness on behalf of the
appellee. He was riding with his father and brother in the car at
the time his father was injured. This witness detailed how the ac-
cident occurred. He told of the injuries to his father; and that they
took the father and Mr. Mueller to the hospital. This question was
then asked the witness: "On the trip from the Newman Home to the
hospital, did Mr. Mueller say anything about the accident?" He
answered, "He would settle it up and make everything" -- Mr. Faulkner,
attorney for the defendant, said, "Object to that. It is not a part
of the res gesta." The Court sustained the objection. At the re-
quest of Mr. Faulkner, the Court struck the same from the record and
instructed the jury to disregard this testimony. These questions and
answers were repeated and the Court again struck the testimony from
the record and instructed the jury to disregard the evidence. The
appellant now insists that this was reversible error on the part of
the appellee in bringing before the jury, in error on the part of the
appellant to compromise for the damage that the appellee had sustained.
In an early part of the witness' testimony, this question was asked
the witness: "What did you say to Mr. Mueller on that occasion?"
He answered, "I asked him what he was doing down on the road."

Question: What did he say to you? A. He said, "Why didn't you see me?" I said, "How could anybody see you with no tail light."

The Court: What was that? A. I asked him what he was doing there, stopping on the road, and he says, "Why didn't you see me?" I says, "How could anybody see you with no tail light." "Well," he says, "Don't get hard about it." He says, "I will settle this and take care of it." After the witness had answered these questions Mr. Faulkner said, "Just a minute. I object to this." The Court overruled the objection. The objection was made after the testimony had been given, and there was no motion made to strike this testimony, so it now stands in the record. It was not reversible error for the witness to give the testimony complained of because practically the same evidence is in the record without a motion to strike the same.

It is seriously contended by the appellant that the appellee was guilty of contributory negligence in not seeing the car of the appellant in time to warn the driver of the car in which the appellee was riding, so as to avoid a collision of the cars. The appellee testifies positively that he was sitting in the seat of the car with his two sons; that while the weather was a little bit hazy they could see a considerable distance ahead of the car; that the lights on their car were in good order, the brakes were working properly, and that while he was riding down the road he was looking straight ahead for the purpose of observing what might be ahead of them on the road.

It is not the law that a guest in a car must be constantly on the lookout for danger ahead. It is a well-known fact that the ordinary automobile is used for pleasure and business and people who are riding as guests in the car, talk and visit and look around, and repose in the driver an ordinary and reasonable amount of confidence, that he will safely and properly drive and manage the car. The guest is only required to do what other reasonable and careful guests would do under like circumstances. To hold otherwise would place a duty upon the guest in the car that would take all of the joy and pleasure

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see me?" I said, "How could anybody see you with no tail light."
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out of riding in automobiles. It is our opinion that the evidence shows that the appellee was exercising that degree of care that the law requires of the occupant of the car while riding in the same, and that he did what a reasonable, ordinary and prudent man would have done under like circumstances, and that he is not guilty of any negligence that proximately contributed to his injury. We find no reversible error in this case and the judgment of the Circuit Court of Will County is hereby affirmed.

Judgment affirmed.

out of riding in automobiles. It is our opinion that the evidence shows that the appellee was exercising that degree of care that the law requires of the occupant of the car while riding in the same, and that he did what a reasonable, ordinary and prudent man would have done under like circumstances, and that he is not guilty of any negligence that proximately contributed to his injury. We find no reversible error in this case and the judgment of the Circuit Court of Will County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause. of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

8705
196
17
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:
Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1933

JAMES T. ROGERS,
Defendant in Error,

vs.

Error to the Circuit Court
of Stark County

BLANCHE L. LEITCH,
Plaintiff in Error.

WOLFE -- P. J.

The defendant in error, James T. Rogers, brought an action of assumpsit against Blanche L. Leitch, plaintiff in error, on three promissory notes, executed by plaintiff in error and her husband, John Leitch. One of the notes is for \$2,000.00, one for \$1,000.00 and one for \$500.00. The notes are dated April 10, 1925, payable to bearer on May 1, 1930, at the bank of Scott, Watters & Rakestraw, at Wyoming, Illinois, with interest at six per cent from May 1, 1925, until maturity and seven per cent interest after maturity. On April 10, 1925, the notes were delivered to the said bank. On the same day they were sold and delivered to the defendant in error.

The notes, with another note for \$1,000.00, were secured by a trust deed conveying 160 acres of land located in Stark County, to George S. Rakestraw as trustee. The trust deed provided that if default be made in the payment of the notes, or interest thereon, then the principal of the notes, together with interest thereon, at the option of the legal holders of the notes, should become due and payable.

To the declaration the plaintiff in error filed a special plea, to which the defendant in error demurred. The demurrer was sustained and judgment was rendered against the plaintiff in error, who now assigns as error in this Court that the judgment sustaining the demurrer is contrary to law. The plea was drawn upon the theory that the facts alleged in the declaration and in the plea, set up the legal defense when a grantee of mortgaged premises, assumes the mortgage debt, and

IN THE
APPELLATE COURT OF ILLINOIS

AND THE DISTRICT

OCTOBER TERM, A. D. 1925

JAMES T. ROGERS,
Defendant in Error,

vs.

ELMOND L. LEITCH,
Plaintiff in Error.

COPY -- P. 1.

The defendant in error, James T. Rogers, brought an action of assumpsit against Elmond L. Leitch, plaintiff in error, on three promissory notes, executed by plaintiff in error and her husband, John Leitch. One of the notes is for \$1,000.00, one for \$1,000.00 and one for \$500.00. The notes are dated April 12, 1925, payable to bearer on May 1, 1930, at the bank of Seattle, Washington, at Wyoming, Illinois, with interest at six per cent from May 1, 1930, until maturity and seven per cent interest after maturity. On April 10, 1925, the notes were delivered to the bank. On the same day they were sold and delivered to the defendant in error.

The notes, with another note for \$1,000.00, were issued by a trust deed conveying 100 acres of land located in Cook County, Illinois, George S. Bakstrom as trustee. The trust deed provided that if default was made in the payment of the notes, or interest thereon, then the principal of the notes, together with interest thereon, in the event of the legal holders of the notes, should become due and payable.

To the declaration the plaintiff in error filed a special plea to which the defendant in error answered. The answer was sustained and judgment was rendered against the plaintiff in error, who now assigns as error in this Court that the judgment sustaining the answer is contrary to law. The plea was drawn upon the theory that the facts alleged in the declaration and in the plea, set up the legal defense when a grantee of mortgaged premises, assumes the mortgage debt, and

the mortgagee with the knowledge of such assumption by the grantee, enters into an agreement with the grantee, without the knowledge or consent of the mortgagor, to extend the time of the payment of the mortgage debt, the mortgagor is released from his obligation to pay the mortgage debt.

The declaration alleges that the equity in the land conveyed by the trust deed, is now in process of foreclosure on a prior mortgage lien; that a receiver has been appointed in said foreclosure proceeding by the Circuit Court of Stark County, Illinois, for the benefit of the holder of said prior lien; that all of the income from said land, plus the sale price of the land, will be insufficient to satisfy the said prior lien; that nothing will remain out of said land and the proceeds thereof, for the benefit of the defendant in error whose interest in said land is cut off by said foreclosure. Thus it is made clear that the primary fund (the land) for the payment of the debt secured by the trust deed has been exhausted.

Pertinent to the question raised by the demurrer to the plea, the declaration in substance alleges that the plaintiff in error, after the execution of the trust deed, conveyed by deed the equity in the land to H. G. Craig, who was to operate the land for the benefit of all persons holding liens against the land; pay the taxes on the land and the interest on the liens out of the income from said land, and later to sell said land; that if there was any surplus remaining in his hands the same was to be paid to the plaintiff in error; that subsequent to the conveyance of the equity to Craig and in furtherance of the agreement aforesaid with the plaintiff in error, on May 1, 1930, Craig extended the payment of the notes for five years and signed five interest or coupon notes, the first of which fell due on May 1, 1931, and the others were made to become due, on the first day of May of each succeeding year, for the remaining four years; that the interest on the three original notes has not been paid after May 1, 1930.

The declaration further alleges that at the time of the extension of the notes an extension agreement was entered into by Craig with George S. Rakestraw, the trustee in the trust deed, extending the trust deed for five years and that the following notation was written on the

the mortgage with the knowledge of such association by the grantee, enters into an agreement with the grantee, without the knowledge or consent of the mortgagor, to extend the time of the payment of the mortgage debt, the mortgagor is released from his obligation to pay the mortgage debt.

The declaration alleges that the equity in the land conveyed by the trust deed, is now in process of foreclosure on a prior mortgage lien; that a receiver has been appointed in said foreclosure proceeding by the Circuit Court of Stark County, Illinois, for the benefit of the holder of said prior lien; that all of the income from said land, plus the sale price of the land, will be insufficient to satisfy the said prior lien; that nothing will remain out of said land and the proceeds thereof, for the benefit of the defendant in error whose interest in said land is cut off by said foreclosure. That it is made clear that the primary fund (the land) for the payment of the debt secured by the trust deed has been exhausted.

Pertinent to the question raised by the defendant to the plea, the declaration in substance alleges that the plaintiff in error, after the execution of the trust deed, conveyed by deed the equity in the land to H. G. Craig, who was to operate the land for the benefit of all persons holding liens against the land; pay the taxes on the land and the interest on the liens out of the income from said land, and later to sell said land; that if there was any surplus remaining in his hands the same was to be paid to the plaintiff in error; that subsequently to the conveyance of the equity to Craig and in furtherance of the agreement aforesaid with the plaintiff in error, on May 1, 1930, Craig extended the payment of the notes for five years and raised five interest or coupon notes, the first of which fell due on May 1, 1931, and the others were made to become due, on the first day of May of each succeeding year, for the remaining four years; that the interest on the three original notes has not been paid after May 1, 1930.

The declaration further alleges that at the time of the extension of the notes an extension agreement was entered into by Craig with George S. Rakestraw, the trustee in the trust deed, extending the trust deed for five years and that the following notation was written on the

backs of the three original notes: "May 1, 1930, Payment of this note is extended to May 1, 1935, at 6% as per extension agreement of this date."

The declaration sets forth the said extension agreement in haec verba, and alleges that the extension agreement was made and completed by filling blanks appearing in a printed form. The portion of the extension agreement hereinafter shown as underlined represents the part thereof which was inserted by typewriting prior to its being signed by Craig. The first paragraph of the extension agreement is as follows: "Know all men by these presents, that H. G. Craig, a bachelor, of the village of LaFayette in the County of Stark and State of Illinois, the owner of certain real estate situated in Stark County, in the State of Illinois described in a trust deed, dated April 10, 1925, given by Blanche L. Leitch and John Leitch, her husband, former of the Town of Goshen in the County of Stark and State of Illinois, now residents of the City of Toledo in the County of Lucas and State of Ohio, to George S. Rakestraw, trustee, and recorded in the office of the Recorder of said County in Book 109 page 21, made to secure four (4) notes therein described for the aggregate principal sum of Forty-five Hundred (\$4,500.00) Dollars, of which the sum of Forty-five Hundred (\$4,500.00) Dollars now remains unpaid, in consideration of the extension of the time of payment of said notes hereby covenant and agree with the said George S. Rakestraw, trustee, his successors and assigns that the time of payment of the principal sum remaining due upon said notes is hereby extended to the first day of May, 1935, and that he will pay the same on the said last named day, and will pay interest on said unpaid principal, as the same accrue, at the rate of six per centum per annum, as evidenced by twenty (20) interest notes, of even date herewith, secured by said deed; and that he will not require the holder of said notes to receive payment of the principal sum remaining due thereon prior to said extended date. Privilege to prepay \$100 or any multiple thereof on any interest date hereafter before maturity. It is understood by the parties hereto that the said H. G. Craig has taken title to this land solely for the purpose of holding the same for the creditors of said Blanche L. Leitch, and it is distinctly understood that he assumes no liability for

back of the three original notes: "May 1, 1935, Payment of this note is extended to May 1, 1935, at 6% as per extension agreement of this date."

The declaration sets forth the said extension agreement in these words, and alleges that the extension agreement was made and completed by filling blanks appearing in a printed form, the portion of the extension agreement hereinafter shown as underlined represents the part thereof which was inserted by typewriting prior to its being signed by Craig. The first paragraph of the extension agreement is as follows: "Know all men by these presents, that H. G. Craig, a resident of the village of Lafayette in the County of Stark and State of Illinois, the owner of certain real estate situated in Stark County, in the State of Illinois described in a trust deed, dated April 10, 1925, given by Blanche L. Leitch and John Leitch, her husband, former of the Town of Gosham in the County of Stark and State of Illinois, now residents of the City of Toledo in the County of Lucas and State of Ohio, to George S. Rakstraw, trustee, and recorded in the office of the Recorder of said County in Book 109 page 31, made to secure four (4) notes therein described for the aggregate principal sum of Forty-five Hundred (\$4,500.00) Dollars, of which the sum of Forty-five Hundred (\$4,500.00) Dollars now remains unpaid, in consideration of the extension of the time of payment of said notes hereby covenant and agree with the said George S. Rakstraw, trustee, his successors and assigns that the time of payment of the principal sum remaining due upon said notes is hereby extended to the first day of May, 1935, and that he will pay the same on the said first named day, and will pay interest on said unpaid principal, as the same accrues, at the rate of six per centum per annum, as evidenced by twenty (20) interest notes, of even date herewith, secured by said deed; and that he will not require the holder of said notes to receive payment of the principal sum remaining due thereon prior to said extended date. Privilege to prepay 100 on any multiple thereof on any interest date hereafter before maturity. It is understood by the parties hereto that the said H. G. Craig has taken title to this land solely for the purpose of holding the same for the creditors of said Blanche L. Leitch, and it is distinctly understood that he assumes no liability for

the signing of this agreement nor for signing the extension interest notes connected therewith, except as the income from the premises described in the trust deed herein mentioned shall liquidate the said interest notes and the principal notes to which they shall be attached. This same understanding applies to an extension agreement covering the lien prior to this now held by the John Hancock Mutual Life Insurance Company."

In the second and last paragraph of the extension agreement, Craig agrees that the trust deed together with all its terms and conditions shall remain in full force as security for the notes in all respects as though the extension agreement has not been made. The agreement is dated May 1, 1930, and signed solely by H. G. Craig. The agreement is under the seal of H. G. Craig.

The declaration further alleges that at no time did Craig ever become liable to pay the principal indebtedness represented by the aforesaid notes or any of the other notes secured thereby, either expressly or impliedly, as the said Craig took the aforesaid deed to said land, subject to all liens thereon and in said extension agreement particularly limited his liability to the income realized from the land conveyed to him; that the said Craig at no time received income of any kind or character from said land and hence paid nothing on the mortgage indebtedness by way of interest or principal, which was in accordance with his contract; that Craig paid nothing and agreed to pay nothing for the transfer of the land to him and there was no consideration for said transfer other than the recital of the nominal consideration in said deed.

The plea sets forth in haec verba the agreement referred to in the declaration and under the terms of which the farm of 160 acres belonging to the plaintiff in error was to be operated and the income therefrom to be used to pay the taxes on the land and the interest on the liens on said land. In regard to the signing of this contract and the terms thereof, it appears from the plea as follows: That subsequent to the execution and delivery of the three notes in question, on November 23, 1929, while the plaintiff in error was still the owner of the land described in the trust deed, and other lands, she and her husband

the signing of this agreement nor for signing the extension agreement
notes connected therewith, except as the notes from and payable to
origin in the trust deed hereby mentioned shall indicate the said
interest notes and the principal notes to which they shall be payable.
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lien prior to this note held by the John H. Hager National Life Insurance
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The declaration further alleges that at no time did Craig ever
become liable to pay the principal indebtedness represented by the
aforesaid notes or any of the other notes secured thereby, either ex-
pressly or impliedly, as the said Craig took the aforesaid deed to said
land, subject to all liens thereon and in said extension agreement par-
ticularly limited his liability to the income realized from the land
conveyed to him; that the said Craig at no time received income of any
kind or character from said land and hence paid nothing on the notes
indebtedness by way of interest or principal, which was in accordance
with his contract; that Craig said nothing and agreed to pay nothing
for the transfer of the land to him and there was no consideration for
said transfer other than the recital of the nominal consideration in
said deed.

The plea sets forth in these words the agreement referred to in
the declaration and under the terms of which the sum of 100 acres belong-
ing to the plaintiff in error was to be granted and the income therefrom
to be used to pay the taxes on the land and the interest on the liens
on said land. In regard to the signing of this contract and the terms
thereof, it appears from the plea as follows: That subsequent to the
execution and delivery of the three notes in question, on November
22, 1929, while the plaintiff in error was still the owner of the
land described in the trust deed, and other lands, she and her husband

John Leitch, as parties of the first part, entered into an agreement with Charles P. Dewey & Sons, a banking corporation, Scott, Walters & Rakestraw, bankers, and the Lafayette State Bank of LaFayette, a banking corporation, in consideration that the plaintiff in error would not take voluntary bankruptcy, and other good consideration to turn over to the parties of the second part the 160 acres of land securing said notes and other lands. It was further agreed that the parties of the second part, for a period of two years from November 23, 1929, should manage all of the lands turned over, unless sooner sold.

This agreement provided that after paying the taxes and interest on liens on the lands the net proceeds derived from said management should be applied as follows: The proceeds of the premises of John Leitch were to be applied on the liquidation of the mortgage indebtedness thereon, and the judgment liens of the second parties enumerated in said contract in the order of priority. The said net proceeds from the management of the 160 acres of land of the plaintiff in error should be applied on the judgment liens of her creditors in the order of their priority as shown by said contract. The agreement provided that Fred Tess should manage the lands and make sale thereof for the largest amount of money possible. His management was to continue for two years.

The agreement further provided that John Leitch and the plaintiff in error should execute deed for said lands whenever the second parties should sell the same, at figures satisfactory to second parties. It was understood that reasonable and proper efforts would be made to obtain the highest price which could be obtained so as to accomplish the purpose of the parties to the agreement. At the completion of the agreement the liens of the creditors, (being parties of the second part) should be paid, and any balance remaining to be paid to John Leitch and plaintiff in error. The agreement also provided that if the proceeds of said management and of said sale did not produce sufficient funds to pay the indebtedness of the plaintiff in error to the LaFayette State Bank, then plaintiff in error would pay the balance of said indebtedness not so paid up to \$1,000.00 out of the proceeds of a certain trust fund created by the will of Pethuel Parish, if the plaintiff in error be living at the time of the death of Celestine A. Parish, her

John Leitch, as parties of the first part, entered into an agreement with Charles P. Dewey & Sons, a banking corporation, Joseph Winters & Makestrav, bankers, and the Lafayette State Bank of Lafayette, a banking corporation, in consideration that the plaintiff in error would not take voluntary bankruptcy, and other good consideration to turn over to the parties of the second part the 160 acres of land secured by said notes and other lands. It was further agreed that the parties of the second part, for a period of two years from November 23, 1929, should manage all of the lands turned over, unless sooner sold.

This agreement provided that after paying the taxes and interest on liens on the lands the net proceeds derived from said management should be applied as follows: The proceeds of the premises of John Leitch were to be applied on the liquidation of the mortgage indebtedness thereon, and the judgment liens of the second parties enumerated in said contract in the order of priority. The said net proceeds from the management of the 160 acres of land of the plaintiff in error should be applied on the judgment liens of her creditors in the order of their priority as shown by said contract. The agreement provided that Tress should manage the lands and make sale thereof for the largest amount of money possible. His management was to continue for two years.

The agreement further provided that John Leitch and the plaintiff in error should execute deed for said lands whenever the second parties should sell the same, at figures satisfactory to second parties. It was understood that reasonable and proper efforts would be made to obtain the highest price which could be obtained so as to accomplish the purpose of the parties to the agreement. At the completion of the agreement the liens of the creditors, (being parties of the second part) should be paid, and any balance remaining to be paid to John Leitch and plaintiff in error. The agreement also provided that if the proceeds of said management and of said sale did not produce sufficient funds to pay the indebtedness of the plaintiff in error to the Lafayette State Bank, then plaintiff in error would pay the balance of said indebtedness not so paid up to \$1,000.00 out of the proceeds of a certain trust fund created by the will of Samuel Leitch, if the plaintiff in error be living at the time of the death of Celestine A. Parish, her

mother, so that said trust fund came into her possession. To that extent plaintiff in error remained liable upon said indebtedness, but to every other the indebtedness of the plaintiff in error to parties of the second part should be forever extinguished and they should have no right to claim anything coming into the hands of the plaintiff in error out of said trust fund, but should, by the agreement, be forever barred from so doing.

The agreement declares that, "the object and purpose of this agreement is on the part of said Blanche Leitch to secure and discharge all her indebtedness except \$1,000.00 as a claim that might be made against said trust fund when it comes into her hands upon the death of her mother, and upon the part of said Blanche Leitch and John Leitch to secure the payment of their indebtedness out of the proceeds of the real estate owned by them in Stark County, Illinois, and of the creditors, parties of the second part, to make more secure the payment finally, and at as early a date as possible, of the amount of said indebtedness, and this contract so turning the property over to said creditors and all of the agreements to release the said Blanche Leitch of her indebtedness except as it can be made out of the management and sale of said property, are mutual considerations for the making and execution of this contract." The agreement was signed by the parties thereto and the plea alleges that proper resolutions were adopted by the directors of the parties of the second part authorizing the officers of said banks to enter into the agreement. The resolutions are set forth in the plea in haec verba.

The plea further alleges that soon after the execution and delivery of said contract, this defendant was notified by said bankers, parties of the second part in said agreement, that said one-hundred sixty acres of land had been sold, and this defendant was directed to execute a deed in conformity with said contract, which was done leaving grantee's name in blank; that thereupon this defendant, John Leitch, her husband, joining her, executed their deed as aforesaid, leaving the grantees' name to be filled in by said second parties; that no account of the proceeds of the sale aforesaid was ever made to this defendant other than that there was a balance due in said management for which this defendant was liable to pay One-thousand Dollars, (\$1,000.00) as provided in said contract; that this defendant did pay said One-thousand Dollars in accordance with the terms and provisions of said contract and did perform all of the terms and provisions of said contract on her part to be performed; that said H. G. Craig took the title to said

mother, so that said trust fund came into her possession. To that extent plaintiff in error remained liable upon said indebtedness, and to every other the indebtedness of the plaintiff in error to parties of the second part should be forever extinguished and they should have no right to claim anything coming into the hands of the plaintiff in error out of said trust fund, but should, by the agreement, be forever barred from so doing.

The agreement declares that, "the object and purpose of this agreement is on the part of said Blanche Letton to secure and discharge all her indebtedness except \$1,000.00 as a claim that might be made against said trust fund when it comes into her hands upon the death of her mother, and upon the part of said Blanche Letton and John Letton to secure the payment of their indebtedness out of the proceeds of the real estate owned by them in Stark County, Illinois, and of the creditors, parties of the second part, to make more secure the payment finally,

and at as early a date as possible, of the amount of said indebtedness, and this contract to turning the property over to said creditors and all the agreements to release the said Blanche Letton of her indebtedness, except as it can be made out of the management and sale of said property,

are mutual considerations for the making and execution of this contract. The agreement was signed by the parties thereto and the vice alleged that proper resolutions were adopted by the directors of the party of the second part authorizing the officers of said bank to enter into the agreement. The resolutions are set forth in one place in case verbal.

The vice further alleges that soon after the execution and delivery of said contract, this defendant was notified by said bankers, parties of the second part in said agreement, that said one-hundred sixty acres of land had been sold, and this defendant was directed to execute a deed in conformity with said contract, which was done leaving said name in blank, and thereupon this defendant, leaving the name blank, executed their deed as aforesaid, leaving the name to be filled in by said second parties; but no account of the proceeds of the sale aforesaid was ever made to this defendant other than that there was a balance due in said management for which this defendant was liable to pay one-thousand dollars, (\$1,000.00) as provided in said contract; that this defendant did pay said one-thousand dollars in accordance with the terms and provisions of said contract and did perform all of the terms and provisions of said contract on her part to be performed; that said H. G. Craig took the title to said

land as purchaser in so far as this defendant is concerned; that if he is trustee as alleged in said declaration, he was not so created by the deed of this defendant or by any other act done by this defendant or to the knowledge of this defendant; that by the payment of said One-thousand Dollars and the execution and delivery of said deed to the said H. G. Craig the agreement in said contract to release this defendant of the indebtedness referred to in said contract became a part of the consideration for the agreement set forth in the declaration of the plaintiff to extend the time of the notes in question at the instance of the said H. G. Craig; that H. G. Craig did promise to pay the indebtedness represented by the note or notes a copy of which is attached to the plaintiff's declaration within the time and manner set forth in the extension agreement and under the conditions and limitations therein set forth in consideration namely, that the time of payment of the principal sum remaining due upon said notes on May 1, 1930, shall be extended for a period of five years, from May 1, 1930 and for the said consideration did promise to pay the interest on said unpaid principal as the same shall accrue from May 1, 1930 for a period of five years, at the rate of six per cent per annum payable annually and at the same time and contemporaneous with the written promise of H. G. Craig endorsed upon the back of each of the said principal notes the following, to wit:

"May 1, 1930, payment of this note extended
to May 1, 1935, at 6% as per extension
agreement of this date."

At which time of the making of said endorsement the said plaintiff, Rogers, was the owner and at the time of the bringing of this suit was in possession of said notes, by means whereof the said plaintiff had knowledge and consented to the extension of the time of the payment of the principal of said notes.

The plea further alleges, that in addition to the contract set out in said additional count the said H. G. Craig entered into another written agreement signed by him in and by which he promised in writing, to pay the bearer of said principal notes, respectively the annual interest for each of the five years constituting said extension,

land as purchaser in so far as this defendant is concerned; that if he is trustee as alleged in said declaration, he was not so treated by the deed of this defendant or by any other act done by said defendant or to the knowledge of this defendant; that by the payment of said One Thousand Dollars and the execution and delivery of said deed to the said H. G. Craig the agreement in said contract to release this defendant of the indebtedness referred to in said contract became a part of the consideration for the agreement set forth in the declaration of the plaintiff to extend the time of the notes in question at the instance of the said H. G. Craig; that H. G. Craig did promise to pay the indebtedness represented by the note or notes a copy of which is attached to the plaintiff's declaration within the time and manner set forth in the extension agreement and under the conditions and limitations therein set forth in consideration namely, that the time of payment of the principal sum remaining due upon said notes on May 1, 1930, shall be extended for a period of five years, from May 1, 1930 and for the said consideration did promise to pay the interest on said unpaid principal as the same shall accrue from May 1, 1930 for a period of five years, at the rate of six per cent per annum payable annually and at the same time and contemporaneous with the written promise of H. G. Craig endorsed upon the back of each of the said principal notes the following, to wit:

May 1, 1930, payment of this note extended to May 1, 1935, at 6% per extension agreement of this date.

At which time of the making of said endorsement the said plaintiff, Rogers, was the owner and at the time of the signing of this note in possession of said notes, by means whereof the said plaintiff and knowledge and consented to the extension of the time of the payment of the principal of said notes.

The plea further alleges, that in addition to the contract set out in said additional count the said H. G. Craig entered into another written agreement signed by him in and by which he promised in writing to pay the bearer of said principal notes, respectively the annual interest for each of the five years constituting said extension,

which interest notes are set out in this defendant's rejoinder to the sixth replication of the plaintiff to the amended first special plea of this defendant; that said interest notes were attached to said principal notes prior to and at the time of the bringing of this suit by the plaintiff and he was the holder of said interest notes and in possession of the same so attached to and made a part of said principal notes, by means whereof the plaintiff had knowledge of the agreement to extend the time of the payment of the interest thereon at 6% in accordance with said interest notes and inconsideration for which the plaintiff did extend the time of payment of said notes; that all of this was done by said plaintiff without the knowledge or consent of this defendant; that Celestine A. Parish, the mother of this defendant, referred to in said contract hereinbefore set out in haec verba, has died and the trust funds held by Charles P. Dewey have become vested in this defendant, One-thousand Dollars, (\$1,000.00) which is part of the identical money paid by this defendant on said contract as hereinbefore set forth, and the balance of said trust fund is the identical funds garnished in this proceeding; that the agreement to extend the time of payment of the notes in question, in which it is said "it is understood by the parties hereto that the said H. G. Craig has taken title to this land solely for the purpose of holding the same for the creditors of said Blanche L. Leitch," is for the benefit of the aforesaid three banking corporations exclusively and not for this defendant; that by reason of the foregoing this defendant is released and discharged from the indebtedness evidenced by the said notes respectively sued upon in this case; that the endorsement on said principal notes, and the annual interest notes contemporaneously executed, constitute the promises and agreements to extend the time in which to pay the principal indebtedness.

The determination and application of the proper legal principles to the situation and relationships of the parties created by the facts alleged and disclosed by the pleadings are not easy tasks. Giving our attention to the contract dated November 23, 1929, which is relied upon in the plea as binding upon the defendant in error, we find that the defendant in error is neither named in the contract as a party there

which interest notes are set out in this defendant's answer to the sixth replication of the plaintiff to the amended first special plea of this defendant; that said interest notes were attached to said principal notes prior to and at the time of the bringing of this suit by the plaintiff and he was the holder of said interest notes and in possession of the same so attached to and made a part of said principal notes, by means whereof the plaintiff had knowledge of the agreement to extend the time of the payment of the interest thereon at the time of the payment of the interest notes and in consideration for which the plaintiff did extend the time of payment of said notes; that all of this was done by said plaintiff without the knowledge or consent of this defendant; that Celestine A. Parish, the mother of this defendant, referred to in said contract heretofore set out in these verbiage, has died and the trust funds held by Charles B. Lewey have become vested in this defendant, One-thousand Dollars, (\$1,000.00) which is part of the identical money paid by this defendant on said contract as heretofore set forth, and the balance of said trust fund is the identical funds furnished in this proceeding; that the agreement to extend the time of payment of the notes in question, in which it is said "it is understood by the parties hereto that the said H. G. Craig has taken title to this land solely for the purpose of holding the same for the creditors of said Mamie L. Litch," is for the benefit of the aforesaid three banking corporations exclusively and not for this defendant; that by reason of the foregoing this defendant is released and discharged from the indebtedness evidenced by the said notes respectively sued upon in this case; that the endorsement on said principal notes, and the annual interest notes contemporaneously executed, constitute the promises and agreements to extend the time in which to pay the principal indebtedness.

The determination and a replication of the proper legal principles to the situation and relationships of the parties created by the facts alleged and disclosed by the pleadings are not easy tasks. Giving our attention to the contract dated November 22, 1909, which is relied upon in the plea as binding upon the defendant in error, we find that the defendant in error is neither named in the contract as a party there

to nor did he sign it. The allegation of the plea that Craig after the delivery of the deed to the land mortgaged in the trust deed, went into possession of the premises, does not state such facts showing a ratification or adoption of the contract by James L. Rogers, the defendant in error. The notes were not due and the defendant in error had no control over the possession of the land because of the provisions of the trust deed. Indeed, if it were legally possible to say that the defendant in error, the mortgagee, controlled the possession of the mortgaged premises, then the contract giving possession to the parties mentioned in the contract, needed the sanction of the defendant in error. We hold that the defendant in error is not bound by the terms of the contract dated November 23, 1929, as he is a stranger to it and his rights as a holder of the principal notes are not impaired by this contract.

The plea alleges, and the demurrer admits, that the deed from the plaintiff in error and her husband, John Leitch, to Craig was executed and acknowledged by the grantors without any grantee named therein. The name of Craig as grantee of the deed was inserted by some one to whom the deed was sent by the Leitches. The deed was therefore void. A deed when executed and acknowledged must have two parties thereto-- a grantor and a grantee. *Donnelly vs. Dumanoski*, 329 Ill., 482. It is not alleged in the pleadings (nor contended by the plaintiff in error) that the deed contains any agreement or statement that Craig assumed the mortgage debt. Craig's liability, if any, for the mortgage debt must be found solely in the extension agreement dated May 1, 1930.

The extension agreement is not signed by the defendant in error nor by George S. Rakestraw, the trustee named in the trust deed. The three principal notes bear the written statements on the backs thereof; "May 1, 1930. Payment of this note extended to May 1, 1935, at 6% as per extension agreement of this date." Under the allegation of the plea, the coupon or interest notes signed by Craig when he executed the extension agreement, were attached to the principal notes and the coupon notes were accepted by the defendant in error. Under these facts the defendant in error can not be heard to say that the extension agreee

to not did he sign it. The allegation of the vice that after the
delivery of the deed to the land mortgaged in the trust deed, went
into possession of the premises, does not state that the plaintiff
ratification or adoption of the contract by the plaintiff, the
defendant in error. The notes were not the defendant in error
had no control over the possession of the land because of the plaintiff
of the trust deed. Indeed, it is well known to say that
the defendant in error, the mortgage, controlling the possession of the
mortgaged premises, then the court of giving possession to the plaintiff
mentioned in the contract, needed the execution of the defendant in error.
We hold that the defendant in error is not bound by the terms of the
contract dated November 23, 1929, as he is a stranger to it and his
rights as a holder of the original notes are not affected by this
contract.

The vice alleges, and the defendant admits, that the deed from the
plaintiff in error and her husband, John H. Smith, to George was executed
and acknowledged by the grantors without any grantee named therein.
The name of George as grantee of the deed was inserted by the plaintiff
whom the deed was sent by the plaintiff. The deed was therefore void.
A deed when executed and acknowledged must have two parties thereto--
a grantor and a grantee. *Hornely vs. Hornely*, 229 Ill. 402. It
is not alleged in the pleading (nor contended by the plaintiff in
error) that the deed contains any error or statement that George
assumed the mortgage debt. George's liability, if any, for the mortgage
debt must be found solely in the extension agreement dated May 1, 1930.
The extension agreement is not signed by the defendant in error
nor by George E. Hornely, the trustee named in the trust deed. The
three principal notes bear the written statements on the back thereof;
May 1, 1930. Payment of this note extended to May 1, 1935, at 8% as
per extension agreement of this date. Under the allegation of the vice,
the coupon or interest notes signed by George when he executed the
extension agreement, were attached to the principal notes and the
coupon notes were accepted by the defendant in error. Under these facts
the defendant in error can not be heard to say that the extension agree-

ment was not made with his authority or knowledge or that Rakestraw did not sign the extension agreement. *Kransz Uedelhofen*, 193 Ill., 477; *Forthman vs. Deters*, 206 Ill., 159.

The extension agreement is under seal and a sufficient consideration is imported. *Adams vs. Peabody Coal Co.*, 230 Ill., 469; *Forthman vs. Deters*, *supra*. This being true we are precluded from inquiring if the extension agreement is lacking in consideration, because Craig promised to pay the principal and interest of the notes out of the income of the land, when Craig had no right to such income. There is nothing in the pleadings indicating that Craig succeeded Tess as manager of the farm, except the purported deed to Craig. The fact that there was no income received by Craig is not a failure of consideration in the legal sense, but a misadventure which Craig assumed by his agreement.

The extension agreement is based on a sufficient consideration. The fact that Craig does not have title to the 160 acres of land does not relieve him from the obligation assumed by him in the extension agreement. Craig was bound by the extension agreement to pay the principal of the notes and the coupon notes out of the income from the land. *Sawyer vs. Bahnsen*, 102 Okla. 41, 226, Pac. 344. Construing the entire extension agreement in all its parts, we hold that Craig was not bound personally to pay the principal notes. *Hayes vs. O'Brien*, 149 Ill., 403. Craig was not bound personally to pay the coupon notes signed by him, as between him and the defendant in error, as the coupon notes and the extension agreement must be construed together to determine their rights under the notes between themselves.

The rule that where a grantee assumes the entire mortgage debt or a part thereof, secured by real estate, and the mortgagee without the sanction of the mortgagor, (knowledge by the mortgagee of the assumption being conceded) extends the time of the payment of the debt, the mortgagor is relieved of the debt, in toto or pro tanto, has not been universally accepted by the Courts. The rule *ipso jure* fixes the relationship, under the above conditions, as that of principal and surety between the grantee and the mortgagor. In such cases the grantee has the land and has withheld enough of the purchase price to pay the mortgage debt, or he is in the position as purchaser so to

ment was not made with his authority or knowledge or that the extension did
 not sign the extension agreement. *Kramer v. Hefner*, 100 Ill. 447.
Forbman v. Peters, 308 Ill. 159.
 The extension agreement is under seal and a sufficient consideration is
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 the mortgagor is relieved of the debt, in toto or in part, has not
 been universally accepted by the Courts. The rule thus fixes
 the relation, under the above conditions, as that of principal
 and surety between the grantee and the mortgagor. In such cases the
 grantee has the land and has withheld enough of the purchase price to
 pay the mortgage debt, or he is in the position as purchaser so to

do, and it is customarily done. The deed makes the grantee the owner of the land and gives him possession thereof, the land being the primary fund for the payment of the debt. The grantee must perform under the terms of the mortgage or the mortgagee has his remedy against him. These, no doubt, are some of the reasons for the above stated rule. Although, the formulation of the exact basis of the rule is difficult.

An extension of time of payment to one not a grantee who assumes the mortgage debt, may be an additional security for the benefit of the mortgagor and the mortgagee. Whether the mortgagee accepts the one assuming the mortgage debt who is not a grantee of the mortgaged premises as the principal debtor, is a question of fact going to the intention of the mortgagee as shown by all the facts and circumstances connected with the agreement and the terms of which the mortgaged debt is assumed. Therefore, we are of the opinion that the inflexible rule, above stated, should not be extended. Novation must be proved by the one alleging it and the intention of the creditor to release the original debtor must appear from the evidence.

It was the duty of the plaintiff in error to pay the notes on May 1, 1930, when they were due. She is not entitled to any indulgence because of her delay in either paying the notes or seeing that they were paid by some one secondarily liable. From the facts stated in the pleadings we do not hold as a matter of law that the mortgagee accepted Craig as the principle debtor of the mortgage debt. Suppose that the mortgagee knows that the mortgagor has entered into an agreement with his judgment creditors giving the management of the land mortgaged to a third person, for a period of time extending beyond the date of maturity of the mortgage debt, with authority to apply the income from the land in payment, first, to the mortgage debt, and, secondly, the debts secured by the judgment liens; and that the mortgagee enters into an agreement with the third person who agrees to pay the mortgage debt and the interest thereon out of the income of the land. Can it be said that the mortgagee, as a matter of law, has accepted the third person as the principle debtor and the mortgagor became a surety for the mortgage debt? We do not think so. Consequently we are of the opinion that the demurrer to the plea should have been overruled.

do, and it is customarily done. The deed makes the grantee the owner of the land and gives him possession thereof, the land being the primary fund for the payment of the debt. The grantee who takes the land on the terms of the mortgage or the mortgagee who is merely against him. These, no doubt, are some of the reasons for the above stated rule. Although, the formulation of the exact basis of the rule is difficult. An extension of time of payment to the mortgagor or a trustee who receives the mortgage debt, may be an additional security for the benefit of the mortgagor and the mortgagee. Whether the mortgagee accepts the same assuming the mortgage debt who is not a grantee of the mortgaged premises as the principal debtor, is a question of fact going to the intention of the mortgagee as shown by all the facts and circumstances connected with the agreement and the terms of which the mortgaged debt is assumed. Therefore, we are of the opinion that the inflexible rule, above stated, should not be extended. Novation may be proved by the one alleging it and the intention of the creditor to release the original debtor must appear from the evidence.

It was the duty of the plaintiff in error to pay the notes on May 1, 1930, when they were due. She is not entitled to any indulgence because of her delay in either paying the notes or seeing that they were paid by some one secondarily liable. From the facts stated in the pleadings we do not hold as a matter of law that the mortgagee accepted Greig as the principal debtor of the mortgage debt. It is true that the mortgagee knows that the mortgagor has entered into an agreement with his judgment creditors giving the management of the land mortgaged to a third person, for a period of time extending beyond the date of maturity of the mortgage debt, with authority to apply the income from the land in payment, first, to the mortgage debt, and, secondly, the debts secured by the judgment liens; and that the mortgagee enters into an agreement with the third person who agrees to pay the mortgage debt and the interest thereon out of the income of the land. Can it be said that the mortgagee, as a matter of law, has accepted the third person as the principal debtor of the mortgage debt, and is thereby relieved from the mortgage debt? We do not think so. Consequently we are of the opinion that the demurrer to the plea should have been overruled.

The judgment is reversed and the case remanded to the Circuit Court of Stark County with directions to overrule the demurrer to the plea and enter an order directing the defendant in error to reply to the plea.

Reversed and remanded with directions.

The judgment is reversed and the case remanded to the Circuit Court of Stark County with directions to overrule the demurrer to the plea and enter an order directing the defendant in error to reply to the plea.

Reversed and remanded with directions.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

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AT A TERM OF THE APPELLATE COURT, 7

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On
FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1933.

ROBERT MEERS and VIOLA E. MEERS, in)
their individual capacity and as)
Executors of the Estate of Robert)
Meers, Deceased,)
(Complainants) Defendants in Error,)

vs.)

WILL COUNTY NATIONAL BANK, CHARLES F.)
HINRICHS and MARY LOUISE MCMANUS, Minor,)
(Defendants) Defendants in Error.)

-----)
HENRY W. MEERS, Minor, JOLIET NATIONAL)
BANK, Guardian of the Estate of Henry)
W. Meers, a Minor, and JOLIET NATIONAL)
BANK, Guardian of the Estate of Mary)
Louise McManus, Minor,)
(Defendants) Plaintiffs in Error,)
and)

JOLIET NATIONAL BANK, Guardian of the)
Estate of Henry W. Meers, a Minor,)
JOLIET NATIONAL BANK, Guardian of the)
Estate of Mary Louise McManus, a Minor,)
and HENRY W. MEERS,)
(Cross Complainants) Plaintiffs in Error,)

vs.)

WILL COUNTY NATIONAL BANK, VIOLA E.)
MEERS and ROBERT MEERS, Executors of the)
Last Will and Testament of Robert Meers,)
Deceased, CHARLES F. HINRICHS, VIOLA E.)
MEERS and ROBERT MEERS,)
(Cross Defendants) Defendants in Error.)

DOVE-J.

ERROR TO THE
CIRCUIT COURT
OF WILL COUNTY.

Robert Meers and Viola Meers, in their individual capacities and as Executors of the Last Will and Testament of their father Robert Meers, filed their bill of complaint reciting that their father died testate on February 11, 1921, that his Will was duly admitted to probate and that complainants qualified as Executors. That by the terms of his will, his granddaughter, Mary Louise McManus was bequeathed \$5000.00 and the balance of his estate was

Mannus was bequeathed \$5000.00 and the balance of his estate was
That by the terms of his will, his granddaughter, Mary Louise
admitted to probate and that complainants be appointed as executors.
father died testate on February 11, 1921, that his will was duly
Robert Meers, filed their bill of complaint reciting that their
ties and as Executors of the last will and Testament of their father
Robert Meers and Viola Meers, in their individual capaci-

DOWN-1.

(Cross Defendants) Defendants in Error.
MEERS and ROBERT MEERS,
Deceased, CHARLES F. HINWICH, VIOLA E.
Last Will and Testament of Robert Meers,
MEERS and ROBERT MEERS, Executors of the
WILL COUNTY NATIONAL BANK, VIOLA E.

vs.

(Cross Complainants) Plaintiffs in Error,
and HENRY W. MEERS,
Estate of Mary Louise Mannus, a Minor,
JOLIET NATIONAL BANK, Guardian of the
Estate of Henry W. Meers, a Minor,
JOLIET NATIONAL BANK, Guardian of the
and
Louis Meers, Plaintiff in Error,
W. Meers, a Minor, and JOLIET NATIONAL
BANK, Guardian of the Estate of Mary
HENRY W. MEERS, Minor, JOLIET NATIONAL

OF WILL COUNTY.
Circuit Court
ERROR TO THE

(Defendants) Defendants in Error.
HINWICH and MARY LOUISE MANNUS, Minor,
WILL COUNTY NATIONAL BANK, CHARLES F.

vs.

(Complainants) Defendants in Error,
Meers, Deceased,
Executors of the Estate of Robert
their individual capacity and as
ROBERT MEERS and VIOLA E. MEERS, in

October Term, A. D. 1923.

SECOND DISTRICT

APPELLATE COURT OF ILLINOIS

IN THE

Gen. No. 8643

Appeals No. 2

bequeathed and devised to complainants and Henry W. Meers in equal shares. That at the time of his death he was engaged in the retail hardware business in Joliet and owed the Will County National Bank approximately \$24,000.00. That soon after the death of Robert Meers, the said bank and Charles F. Hinrichs wrongfully and without authority took charge of the said hardware business, acting as Executors de son tort, and continued to operate it in the name of complainants, but that complainants had no voice in the manner of conducting the business, but were induced, persuaded and compelled to permit the bank and Hinrichs to operate said business. That on April 12, 1921, Viola E. Meers was appointed guardian of Henry W. Meers, but later resigned, and on November 14, 1921 the Will County National Bank succeeded her as guardian, duly qualified and continued to act until it was succeeded by the Joliet National Bank in 1924.

The bill further alleged that in January 1924, a corporation known as the Robert Meers Hardware Company was organized for the purpose of taking over the hardware business, and on January 29, 1924, the complainants, as executors, acting under the direction of the Probate Court, sold the hardware stock, shop, tools, accounts receivable and leases to the corporation. That the business was conducted in a wasteful and inefficient manner by the bank and Hinrichs, resulting in liabilities being incurred amounting to \$80,000.00. That the Will County Bank took the money realized from the sale of the assets of the estate and paid not only its own claim amounting to \$29,398.65, but paid other claims which were never filed or presented for allowance to the Probate Court, that by so doing, the assets of the estate derived from the sale of the personal property was exhausted and necessitated a sale of the real estate which was done and \$30,200.00 realized therefrom. That the Robert Meers Hardware Company is insolvent and has been since a short time after it was organized to take

depreciated and devised to complainants and Henry W. Meers in equal shares. That at the time of his death he was engaged in the retail hardware business in Joliet and owed the Will County National Bank approximately \$84,000.00. That soon after the death of Robert Meers, the said bank and Charles F. Hinrichs wrongfully and without authority took charge of the said hardware business, acting as executors de son tort, and continued to operate it in the name of complainants, but that complainants had no voice in the manner of conducting the business, but were induced, persuaded and compelled to permit the bank and Hinrichs to operate said business. That on April 12, 1921, Viola E. Meers was appointed guardian of Henry W. Meers, but later resigned, and on November 14, 1921 the Will County National Bank succeeded her as guardian, duly qualified and continued to act until it was succeeded by the Joliet National Bank in 1924.

The bill further alleged that in January 1924, a corporation known as the Robert Meers Hardware Company was organized for the purpose of taking over the hardware business, and on January 29, 1924, the complainants, as executors, acting under the direction of the Probate Court, sold the hardware stock, shop, tools, accounts receivable and leases to the corporation. That the business was conducted in a wasteful and inefficient manner by the bank and Hinrichs, resulting in liabilities being incurred amounting to \$80,000.00. That the Will County Bank took the money realized from the sale of the assets of the estate and did not only its own claim amounting to \$20,398.65, but paid other claims which were never filed or presented for allowance to the Probate Court, that by so doing, the assets of the estate derived from the sale of the personal property was exhausted and necessitated a sale of the real estate which was done and \$0,500.00 realized therefrom. That the Robert Meers Hardware Company is insolvent and has been since a short time after it was organized to take

over the hardware business, and that the notes which it executed in payment of the purchase of the accounts receivable from said estate have not been paid and are now in possession of the Will County Bank and Hinrichs.

The bill made the Will County National Bank, Charles F. Hinrichs, Mary Louise McManus and Henry W. Meers, Minors, and the Joliet National Bank, Guardian of Henry W. Meers and Mary Louise McManus, Minors, parties defendant, and prayed for an accounting by the Will County National Bank and Charles F. Hinrichs of all matters pertaining to the estate, and that their liability to the estate be determined and that they be held liable for all losses sustained by the estate occasioned by their mismanagement.

The Joliet National Bank, as guardian for Henry W. Meers and Mary Louise McManus, answered the bill, admitting practically all of its allegations, and filed a cross-bill which made similar charges against the bank and Hinrichs as were made in the original bill, and prayed that an account be taken and the liability of the Will County National Bank, Charles F. Hinrichs, and the executors, for waste and mismanagement of the assets of the estate of Robert Meers, deceased, be fixed and determined. At the time of the hearing before the Chancellor on exceptions to the Master's Report, Henry W. Meers, who had become of age, joined as cross-complainant, and the cross bill was amended by the addition of allegations charging the Will County National Bank, while acting as guardian for Henry Meers, received assets of the estate of Robert Meers which it permitted to be wasted. That while acting as guardian, the Will County National Bank received \$33,275.00 of the assets of this estate, one-third of which belonged to Henry Meers, which it paid out without authority in payment of claims and liabilities incurred by the executors in the unlawful conduct of the Hardware business: that it made,

over the hardware business, and that the notes which it executed in payment of the purchase of the accounts receivable from said estate have not been paid and are now in possession of the Will County Bank and Hinrichs.

The bill made the Will County National Bank, in the T. Hinrichs, Mary Louise McManus and Henry W. Meers, Minors, and the Joliet National Bank, Guardian of Henry W. Meers and Mary Louise McManus, Minors, parties defendant, and prayed for an accounting by the Will County National Bank and Charles T. Hinrichs of all matters pertaining to the estate, and that their liability to the estate be determined and that they be held liable for all losses sustained by the estate occasioned by their mismanagement. The Joliet National Bank, as guardian for Henry W.

Meers and Mary Louise McManus, answered the bill, admitting practically all of its allegations, and filed a cross-bill which made similar charges against the bank and Hinrichs as were made in the original bill, and prayed that an account be taken and the liability of the Will County National Bank, Charles T. Hinrichs, and the executor, for waste and mismanagement of the estate of Robert Meers, deceased, be fixed and determined. At the time of the hearing before the Chancellor on exceptions to the Master's Report, Henry W. Meers, who had become of age, joined as cross-complainant, and the cross bill was amended by addition of allegations charging the Will County National Bank, while acting as guardian for Henry Meers, received assets of the estate of Robert Meers which it permitted to be wasted. That while acting as guardian, the Will County National Bank received \$2,275.00 of the assets of this estate, one-third of which belonged to Henry Meers, which it paid out without authority in payment of claims and liabilities incurred by the executor in the unlawful conduct of the hardware business: that it made,

while acting as guardian of Henry Meers, no effort to collect the sum of \$666.67, the amount of insurance money Viola E. Meers, his former guardian, had collected. That the claim the Will County National Bank filed against the Robert Meers estate included an overdraft of \$4615.74, which represented money used unlawfully by the Executors in conducting the hardware business, and that in filing said claim and having it allowed, the bank acted contrary to the interests of its ward, and should be required to account for Henry's share of said money.

The Will County National Bank and Hinrichs answered the original bill and the cross-bill as amended. By their answers they denied substantially all the allegations thereof and averred that Robert Meers, the decedent was insolvent at the time of his death, and had all the assets of his estate been converted into cash, there would not have been sufficient money realized therefrom to pay the debts and claims against his estate. The answers also averred that all the moneys handled by the bank in connection with the estate of Robert Meers, deceased, were handled by it as agent for the Executors and has been fully accounted for by it to the executors.

There was a hearing in open court before the Chancellor upon the original bill, cross-bill and answers thereto, and on March 18, 1930 a decree was entered which found the facts concerning the death of Robert Meers, the appointment of the executors, the provisions of his Will, the appointment of the Will County National Bank as guardian of Henry W. Meers and its discharge as guardian. It found that the executors, without any authority under the will and without any order of the Probate Court, conducted the hardware business. This decree also found that neither the Will County National Bank or Hinrichs took charge of or operated the hardware business and that neither of them intermeddled in the estate

while acting as guardian of Henry Meers, no effort to collect the sum of \$368.87, the amount of insurance money. Also, his former guardian, had collected. That the claim the Will County National Bank filed against the Robert Meers estate included an overdraft of \$4515.74, which represented money used unlawfully by the Executors in conducting the hardware business, and that in filling said claim and having it allowed, the bank acted contrary to the interests of its ward, and should be required to account for Henry's share of said money.

The Will County National Bank and Kinrichs answered the original bill and the cross-bill as amended. By their answers they denied substantially all the allegations thereof and averred that Robert Meers, the decedent was insolvent at the time of his death, and had all the assets of his estate been converted into cash, there would not have been sufficient money realized therefrom to pay the debts and claims against his estate. The answers also averred that all the moneys handled by the bank in connection with the estate of Robert Meers, deceased, were handled by it as agent for the Executors and has been fully accounted for by it to the executors.

There was a hearing in open court before the Chancellor upon the original bill, cross-bill and answers thereto, and on March 18, 1930 a decree was entered which found the facts concerning the death of Robert Meers, the appointment of the executors, the provisions of his will, the appointment of the Will County National Bank as guardian of Henry W. Meers and its discharge as guardian. It found that the executors, without any authority under the will and without any order of the Probate Court, conducted the hardware business. This decree also found that neither the Will County National Bank or Kinrichs took charge of or operated the hardware business and that neither of them intermeddled in the estate

affairs and that there was no liability on their part as executors ~~an~~ son tort and that all moneys belonging to the estate which the bank handled were handled by it as agent of the executors and have been fully accounted for by the bank to the executors. The decree further found that an account should be taken in order to determine the profit or loss sustained by Henry W. Meers and Mary Louise McManus by reason of the operation of the hardware business by the executors, and in the event it was determined that a loss was sustained, that an account should be taken to determine whether there is any liability for such loss on the part of the Will County National Bank as guardian of Henry W. Meers and the extent of such loss if any. This decree dismissed the original bill of complaint and dismissed the cross-bill as to Charles F. Hinrichs and referred the cause to the Master for the purposes therein stated, and directed him to report his conclusions of law and fact.

The evidence is voluminous, consisting of fourteen hundred seventy-five pages of testimony and exhibits. From the evidence the Master found that the operation of the hardware business by the executors, after the death of Robert Meers, was unauthorized. That the business had been mismanaged and of these facts the bank, as guardian, had notice. That Henry Meers, then a minor, had sustained a loss by reason thereof, for which the bank, as his guardian, was liable. That in the operation of the hardware business, a loss of \$3515.82 was sustained during the period beginning November 14, 1921 and ending December 31, 1921, one third of which amount, \$1171.94, was lost to Henry Meers. The Master further found that the bank had wilfully paid to creditors of decedent who had not filed their claims or to creditors of the executors on claims arising out of the unauthorized conduct of the business, the sum of \$27,324.93 during the period the bank was acting as guardian of Henry Meers and that by so doing, one-third of this sum, computed

affairs and that there was no liability on their part as executors or
son tort and that all moneys belonging to the estate which the bank
handled were handled by it as agent of the executors and have been fully
accounted for by the bank to the executors. The decree further
found that an account should be taken in order to determine the
profit or loss sustained by Henry W. Meers and Mary Louise McManis
by reason of the operation of the hardware business by the executors,
and in the event it was determined that a loss was sustained, that
an account should be taken to determine whether there is any lia-
bility for such loss on the part of the Will County National Bank
as guardian of Henry W. Meers and the extent of such loss if any.
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1921 and ending December 31, 1921, one third of which amount,
\$1171.94, was lost to Henry Meers. The Master further found that
the bank had willfully paid to creditors of decedent who had not
filed their claims or to creditors of the executors on claims dis-
ting out of the unauthorized conduct of the business, the sum of
\$7,324.93 during the period the bank was acting as guardian of
Henry Meers and that by so doing, one-third of this sum, computed

by the Master as \$9109.31, instead of \$9108.31 was lost to Henry Meers. The Master further found that the bank had advanced to the executors, to enable them to carry on the business, the sum of \$4615.74, and that the bank included this sum in its claim which it filed against the estate, and which, subsequently, as creditor of the estate, it received, thereby causing a loss to Henry Meers for one-third thereof, or \$1538.58. The Master further found that the bank was liable to Henry Meers for \$666.67, the amount, as shown by her final report, in the hands of Viola Meers when the bank succeeded her as guardian.

Objections to this report were filed by the bank, and being overruled were renewed as exceptions before the Chancellor and by him sustained and a decree rendered dismissing the cross-bill for want of equity, and the record is brought to this court for review by Henry W. Meers, plaintiff in error.

It is his contention that in addition to the liability of the bank as his guardian, for the several sums as found by the Master, this decree is erroneous in not finding that the bank was acting as Executor de son tort of the will of Robert Meers, deceased, and is therefore liable to account for all the assets of the estate which it handled.

Defendant in error contends first, that there is no basis in the evidence for the findings made by the Master, as to its liability as guardian for any of the several items as found by the Master; second, that the estate of Robert Meers at the time of his death, as shown by the evidence, was insolvent so far as Henry Meers was concerned, and that even if the estate had been properly administered, Henry Meers would have received nothing; third, that all the assets of the estate which came into ~~its~~ hands were paid out by it as agent for the executors; fourth, that the decree entered on March 18, 1930, which found that defendant in error was not liable as executor de son tort and which further found that

by the Master as \$9108.31, instead of \$9108.31 was lost to Henry Meers. The Master further found that the bank had advanced to the executors, to enable them to carry on the business, the sum of \$4615.74, and that the bank included this sum in its claim which it filed against the estate, and which, subsequently, as creditor of the estate, it received, thereby causing a loss to Henry Meers for one-third thereof, or \$1538.58. The Master further found that the bank was liable to Henry Meers for \$686.67, the amount, as shown by her final report, in the hands of Viola Meers when the bank succeeded her as guardian.

Objections to this report were filed by the bank, and being overruled were renewed as exceptions before the Chancellor and by him sustained and a decree rendered dismissing the cross-bill for want of equity, and the record is brought to this court for review by Henry W. Meers, plaintiff in error.

It is his contention that in addition to the liability of the bank as his guardian, for the several sums as found by the Master, this decree is erroneous in not finding that the bank was acting as Executor de son tort of the will of Robert Meers, deceased, and is therefore liable to account for all the assets of the estate which it handled.

Defendant in error contends first, that there is no basis in the evidence for the findings made by the Master, as to its liability as guardian for any of the several items as found by the Master; second, that the estate of Robert Meers at the time of his death, as shown by the evidence, was insolvent so far as Henry Meers was concerned, and that even if the estate had been properly administered, Henry Meers would have received nothing; third, that all the assets of the estate which came into his hands were paid out by it as agent for the executors; fourth, that the decree entered on March 18, 1930, which found that defendant in error was not liable as executor de son tort and which further found that

all of the assets of the estate which came into its hands were paid out by it as agent of the executors was final and conclusive, and never having been reviewed, that these questions are therefore not presented to this court for review upon this writ of error.

The evidence discloses that Robert Meers died testate, February 11, 1921; his will was admitted to probate on April 1, 1921, and Letters Testamentary issued to Viola E. Meers, then thirty-one years of age, and Robert Meers Jr., then twenty-five years old, two of his children. He had one other child, a son, Henry, then twelve years of age, plaintiff in error in this case, By his will be bequeathed \$5000.00 to his granddaughter, Mary Louise McManus, then three years of age, and all the rest of his estate was given to his three children in equal shares. Robert Meers, prior to his death, had been engaged in the retail hardware business for many years. His estate consisted of real and personal property. Viola, on April 12, 1921, was appointed guardian for Henry, and served until November 19, 1921, when she was succeeded by the Will County National Bank. On October 28, 1924, this bank filed its final report as guardian, reciting that it had collected no money and had no money on hand belonging to the ward, and asked to be discharged. On November 3, 1924, this report was approved and the bank was discharged. Without any authority under the provisions of the will, and without any order of the Probate Court, the executors, after the death of their father, operated the store until January 1924, when the Probate Court authorized its sale for \$27,500.00 to the Robert Meers Hardware Company, a corporation, that had been organized to take over the business. Between October 6, 1923 and January 28, 1924, this amount was brought to the bank by Robert Meers Jr., one of the executors, and paid out by the bank upon certain claims hereinafter referred to.

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6, 1923 and January 28, 1924, this amount was brought to the bank by Robert Meers Jr., one of the executors, and paid out by the bank that had been organized to take over the business. Between October 27, 500.00 to the Robert Meers Hardware Company, a corporation, January 1924, when the Probate Court authorized its sale for 27,500.00 to the Robert Meers Hardware Company, a corporation, after the death of their father, operated the store until of the will, and without any order of the Probate Court, the executor was discharged. Without any authority under the provisions charged. On November 3, 1924, this report was approved and the final report as guardian, reciting that it had collected no money County National Bank. On October 28, 1924, this bank filed its served until November 19, 1921, when she was succeeded by the Viola, on April 12, 1921, was appointed guardian for Henry, and for many years. His estate consisted of real and personal property. prior to his death, had been engaged in the retail hardware business was given to his three children in equal shares. Robert Meers, McManus, then three years of age, and all the rest of his estate his will be bequeathed \$2000.00 to his granddaughter, Mary Louise Henry, then twelve years of age, plaintiff in error in this case, 25 years old, two of his children. He had one other child, a son, thirty-one years of age, and Robert Meers Jr., then twenty-five 1921, and Letters Testamentary issued to Viola M. Meers, then February 11, 1921; his will was admitted to probate on April 1, The evidence discloses that Robert Meers died testate, not presented to this court for review upon this writ of error. never having been reviewed, that these questions are therefore out by it as agent of the executor was final and conclusive, and all of the assets of the estate which came into its hands were paid

On January 22, 1925 the executors filed in the Probate Court an account designated as their Just and True Account. In this account they reported that in addition to the filed claims against the estate, there were claims incurred before the death of decedent, which were never filed, and part of which had been paid by money advanced by the executors out of the sale of personal property. On January 29, 1925 the executors filed their petition to sell the real estate of the deceased, and a decree was entered on March 6, 1925 resulting in the building in which the hardware business was conducted being sold for \$30,200.00 on April 18, 1925. The decedent carried \$12,000.00 life insurance, which was payable to his children, and this was collected while Viola was Henry's guardian, and deposited in the Joliet Trust and Savings Bank.

The decree of March 18, 1920, after reciting that the cause was heard upon the bill of complaint and answers, and the cross-bill and answers, found that neither the Will County National Bank nor the defendant Charles F. Hinrichs intermeddled in the affairs of the estate of Robert Meers, deceased, and that there is no liability as executor de son tort on the part of either of said defendants and that all moneys belonging to said estate, which the said bank handled, were handled by it as agent of the executors and have been fully accounted for by the bank to the executors. The decree then found that an accounting should be taken and ordered the dismissal of the original bill of complaint and the dismissal of the cross-bill as to Charles F. Hinrichs. It then decreed that an account be taken first, to ascertain the profit or loss sustained by Henry Meers and Mary Louise McManus by reason of the operation of the hardware business by the executors after the death of decedent, and second, if it is determined that a loss was sustained by Henry W. Meers, that the extent of the loss be then ascertained

On January 22, 1925 the executor filed in the Probate Court an account designated as their last and True Account. In this account they reported that in addition to the filed claims against the estate, there were claims incurred before the death of decedent, which were never filed, and part of which had been paid by money advanced by the executor out of the sale of personal property. On January 29, 1925 the executor filed their petition to sell the real estate of the deceased, and a decree was entered on March 6, 1925 resulting in the building in which the hardware business was conducted being sold for \$30,800.00 on April 18, 1925. The decedent carried \$12,000.00 life insurance, which was payable to his children, and this was collected while Viola was Henry's Guardian, and deposited in the Joint Trust and Savings Bank. The decree of March 18, 1920, after reciting that the cause was heard upon the bill of complaint and answers, and the cross-bill and answers, found that neither the Will County National Bank nor the defendant Charles T. Hinrichs intermeddled in the affairs of the estate of Robert Meers, deceased, and that there is no liability as executor de son tort on the part of either of said defendants and that all moneys belonging to said estate, which the said bank handled, were handled by it as agent of the executor and have been fully accounted for by the bank to the executor. The decree then found that an accounting should be taken and ordered the dismissal of the original bill of complaint and the dismissal of the cross-bill as to Charles T. Hinrichs. It then decreed that an account be taken first, to ascertain the profit or loss sustained by Henry Meers and Mary Louise McManus by reason of the operation of the hardware business by the executor after the death of decedent, and second, if it is determined that a loss was sustained by Henry W. Meers, that the extent of the loss be then ascertained.

and that then it be determined whether there is any liability for such loss on the part of the bank as guardian of Henry Meers, and third, whether there is any liability on the part of the bank as guardian on account of its having been Henry's guardian.

Counsel for plaintiff in error insist that inasmuch as this decree left the question of the liability of the bank as guardian to be determined after the hearing by the Master, the decree was not final but in all respects an interlocutory one.

Both the original bill and the cross-bill contained allegations charging that the bank and Hinrichs wrongfully and without authority took charge of the hardware business, acting as executors de son tort. Whether the bank acted as an executor de son tort or whether it acted as agent of the executors, and if so, whether it had fully accounted to the executors for the moneys of the estate which the bank handled, were issues presented by the pleadings and which were determined by the Chancellor in his decree of March 18, 1930. That decree expressly found that all the moneys belonging to the estate which the bank handled were handled by it as agent of the executors and have been fully accounted for by the bank to the executors. Upon these findings the Chancellor dismissed the original bill and retained the cross-bill for the purpose of ascertaining whether the minors sustained a loss by reason of the executors operating the hardware business after the death of the decedent, and if so whether the bank is liable therefor, and whether there is any liability on the part of the bank because it was the guardian of Henry Meers. A decree may be interlocutory in some respects and final in others. *Stahl v. Stahl*, 220 Ill., 288. In our opinion, except in so far as it directed an accounting, this was a final decree, but that portion which ordered the Master to take an account and determine the questions specifically mentioned in the decree was interlocutory and the evidence taken by the Master upon that reference is before us for review.

and that then it be determined whether there is any liability for such loss on the part of the bank as guardian of Henry Meers, and third, whether there is any liability on the part of the bank as guardian on account of its having been Henry's guardian.

Counsel for plaintiff in error insists that it should be determined after the hearing by the Master, the decree was not final but in all respects an interlocutory one.

Both the original bill and the cross-bill contained allegations charging that the bank and Hinckley wrongfully and without authority took charge of the hardware business, acting as executors of the son's estate. Whether the bank acted as an executor of the son's estate or whether it acted as agent of the executors, and if so, whether it had fully accounted to the executors for the moneys of the estate which the bank handled, were issues presented by the pleadings and which were determined by the Chancellor in his decree of March 13, 1930.

That decree expressly found that all the moneys belonging to the estate which the bank handled were handled by it as agent of the executors, and have been fully accounted for by the bank to the executors. Upon these findings the Chancellor dismissed the original bill and retained the cross-bill for the purpose of ascertaining whether the executors sustained a loss by reason of the executors operating the hardware business after the death of the decedent, and if so whether the bank is liable therefor, and whether there is any liability on the part of the bank because it was the guardian of Henry Meers. A decree may be interlocutory in some respects and final in others. Stahl v. Stahl, 230 Ill., 288. In our opinion, except in so far as it directed an accounting, this was a final decree, but that portion which ordered the Master to take an account and determine the questions specifically mentioned in the decree was interlocutory and the evidence taken by the Master upon that reference is before us for review.

The Master found from the evidence that the loss sustained by the executors in operating the hardware business, from November 16, 1921 to December 31, 1921, was \$3515.82, and the bank should be held responsible to plaintiff in error, Henry Meers for one-third of that amount. The final decree which was rendered on March 25, 1931, found that the executors lost \$30,642.52 in operating the hardware business from March 1, 1921 to December 31, 1921. Of course, defendant in error should not be held responsible for any loss that may have occurred prior to the time it became guardian for Henry Meers, and counsel for plaintiff in error states that it was difficult to establish the amount of the loss for the last half of November and for the month of December, 1921, but insists that the proof did indicate that the loss would be something over \$3000.00. We have examined the evidence and are at a loss to understand how the Master arrived at his estimate. Furthermore, the Master reported that while Mary Louise McManus had sustained a loss by reason of her legacy not having been paid to her, he was unable to determine from the evidence whether or not that loss was sustained by reason of the operation of the hardware business by the executors. We do not understand how the evidence convinced the Master that the bank, as guardian for Henry, was liable for the loss sustained by the executors, yet it was insufficient for him to determine whether Mary Louise McManus lost her legacy by reason of the operation of the hardware business by the executors. A finding of this character, in order to charge this guardian, must not rest upon speculation, and the Chancellor properly sustained an exception to this finding of the Master.

The next finding of the Master was that the bank, while acting as guardian, had wilfully paid out \$27,324.93 either to creditors of the deceased, who had not filed claims, or else to creditors of the executors. The evidence discloses that between October 6, 1923 and January 28, 1924, one of the executors, Robert Meers Jr., left with

The Master found from the evidence that the loss sustained by the executor in operating the hardware business, from November 16, 1931 to December 31, 1931, was \$3315.82, and the bank should be held responsible to plaintiff in error, Henry Means for one-third of that amount. The final decree which was rendered on March 22, 1931, found that the executor lost \$30,842.82 in operating the hardware business from March 1, 1931 to December 31, 1931. Of course, defendant in error should not be held responsible for any loss that may have occurred prior to the time it became guardian for Henry Means, and counsel for plaintiff in error states that it was difficult to establish the amount of the loss for the last half of November and for the month of December, 1931, but insists that the proof did indicate that the loss would be something over \$3000.00. We have examined the evidence and are at a loss to understand how the Master arrived at his estimate. Furthermore, the Master reported that while Mary Louise McManus had sustained a loss by reason of her legacy not having been paid to her, he was unable to determine from the evidence whether or not that loss was sustained by reason of the operation of the hardware business by the executors. We do not understand how the evidence convinced the Master that the bank, as guardian for Henry, was liable for the loss sustained by the executors, yet it was insufficient for him to determine whether Mary Louise McManus lost her legacy by reason of the operation of the hardware business by the executors. A finding of this character, in order to charge this guardian, must rest upon ascertainment, and the Chancellor properly sustained an exception to this finding of the Master.

The next finding of the Master was that the bank, while acting as guardian, had willfully paid out \$27,324.93 either to creditors of the deceased, who had not filed claims, or else to creditors of the executors. The evidence discloses that between October 8, 1933 and January 28, 1934, one of the executors, Robert Moore Jr., left with

the bank \$27,500.00. This was brought to the bank at six different times and varied in amounts from \$1,000.00 to \$14,870.80, and represented the purchase price for the stock of hardware sold, under order of the Probate Court to the Robert Meers Hardware Company in January, 1924. In addition to this \$27,500.00, the bank did receive from the executors additional sums making the total amount it received \$33,275.00. Of this amount, the Master found that the bank should be credited for certain sums which were paid out by the bank on the award to the daughter of Viola Meers, real estate taxes and certain filed claims, leaving a balance of \$27,324.93 which the bank wrongfully paid out. The decree of March 18, 1930 specifically found that all these moneys handled by the bank belonging to said estate were handled by it as agent of the executors and have been fully accounted for by the bank. We have examined the evidence and arrive at the same conclusion. What the bank did with this money was to aid the executor in determining the amount due each creditor and when that was done the bank mailed out dividend checks in two installments, one for 25% and another for 15% of the amount of the several claims of the respective creditors, and it might be noted that the bank itself, upon its filed and allowed claim, sustained a loss of 60%, the same as other creditors.

The next finding of the Master was that the bank made an advancement of \$4615.74 to the executors and included this amount in its filed and allowed claim, which was subsequently paid and by accepting such payment, one-third thereof was lost to Henry Meers and the bank should be held liable therefor. Plaintiff in error, however, by his amended cross-bill, alleged that Robert Meers, at the time of his death, was indebted to the bank in the sum of approximately \$24,000.00 and that the bank filed its claim for the amount due it against his estate. The evidence shows that the claim of the bank was filed on March 31, 1922, for \$22,982.52. At the time of the death of Robert Meers, he was endorser on trade acceptances aggregating

the bank \$27,500.00. This was brought to the bank at all different times and varied its amounts from \$1,000.00 to \$14,000.00, and represented the purchase price for the stock of hardware sold, under order of the Probate Court to the Robert Meers Hardware Company in January, 1924.

In addition to this \$27,500.00, the bank did receive from the executors additional sums making the total amount it received \$32,775.00. 00 this amount, the Master found that the bank should be credited for certain sums which were paid out by the bank on the award to the daughter of Viola Meers, real estate taxes and certain tiled claims, leaving a balance of \$27,324.98 which the bank wrongfully paid out. The George of March 18, 1920 specifically found that all these moneys handled by the bank belonging to said estate were handled by it as agent of the executors and have been fully accounted for by the bank. We have examined the evidence and arrive at the same conclusion. That the bank did with this money was to aid the executor in determining the amount due each creditor and when that was done the bank mailed out dividend checks in two installments, one for 25% and another for 15% of the amount of the several claims of the respective creditors, and it might be noted that the bank itself, upon its tiled and allowed claim, sustained a loss of 20%, the same as other creditors.

The next finding of the Master was that the bank had an advancement of \$4012.74 to the executors and included this amount in its tiled and allowed claim, which was subsequently paid and by accepting such payment, one-third thereof was lost to Henry Meers and the bank should be held liable therefor. Plaintiff in error, however, by his amended cross-bill, alleged that Robert Meers, at the time of his death, was indebted to the bank in the sum of a previously \$24,000.00 and that the bank filed its claim for the amount due it against his estate. The evidence shows that the claim of the bank was tiled on March 21, 1922, for \$24,000.00. At the time of the death of Robert Meers, he was engaged on trade acceptances aggregating

\$6475.05, which he had discounted at the bank. These acceptances were taken up by the executors who substituted their notes therefor. By so doing, the bank did not release the estate unless it was shown that such was the intention of both of the parties to the transaction. 24 C. J. 447. And the bank, in our opinion, was justified in including in its claim the amount remaining unpaid upon these original acceptances. Furthermore, while we feel that the findings of the former decree preclude plaintiff in error from raising this question in this hearing, we have examined the evidence, and in our opinion the Chancellor was warranted in sustaining the exception to this finding.

Finally, the Master found the bank liable as guardian for \$666.67, the amount in the hands of its predecessor guardian, Viola Meers, which the Master found the bank should have collected. The evidence in this record does not show whether Viola Meers ever paid this money to her brother or not, or whether the Joliet National Bank which succeeded the City National Bank as guardian some nine years ago has this fund. All the record discloses with reference to this item is the final report of Viola Meers, which shows that at the time her final report was made, she charged herself with this amount. The final report of the bank as guardian was approved by the Probate Court on November 3, 1924. It showed no receipts and no expenditures. In this proceeding, there being no evidence by which we can say that this amount has been lost to plaintiff in error, the Chancellor did not err in sustaining an exception to this portion of the Master's report.

Plaintiff in error further insists that at the time of the death of Robert Meers, his estate was solvent, while defendant in error is equally earnest in insisting that it was not. We have given this record careful consideration. No good purposes would be subserved by extending this opinion. We concede that this estate was woefully mismanaged and the Statute with reference to the administration of estates not observed, but we do not believe that plaintiff in error

These acceptances were taken up by the executor who substituted their notes therefor. By so doing, the bank did not release the estate unless it was shown that such was the intention of both of the parties to the transaction. And the bank, in our opinion, was justified in holding in its claim the amount remaining unpaid upon these original acceptances. Furthermore, while we feel that the findings of the former decree preclude plaintiff in error from raising this question in this

hearing, we have examined the evidence, and in our opinion the Chancellor was warranted in sustaining the exception to this finding.

Finally, the Master found the bank liable as guardian for \$806.67, the amount in the hands of its predecessor guardian, Viola Meers, which the Master found the bank should have collected. The evidence in this record does not show whether Viola Meers ever paid

this money to her brother or not, or whether the Joliet National Bank which succeeded the City National Bank as guardian some nine years ago has this fund. All the record discloses with reference to this item is the final report of Viola Meers, which shows that at the time her final report was made, she charged herself with this amount. The final report of the bank as guardian was approved by the Probate Court on November 8, 1924. It showed no receipts and no expenditures. In this proceeding, there being no evidence by which we can say that this amount has been lost to plaintiff in error, the Chancellor did not err in sustaining an exception to this portion of the Master's report.

Plaintiff in error further insists that at the time of the death of Robert Meers, his estate was solvent, while defendant in error is equally earnest in insisting that it was not. We have given this record careful consideration. No good purpose would be served by extending this opinion. We concede that this estate was woefully mismanaged and the estate with reference to the administration of estates not observed, but we do not believe that plaintiff in error

has lost anything by reason of the actions of his guardian, defendant in error, nor that defendant in error can be held under the proof in this record to be required to pay any sum to him.

The decree dismissing the cross-bill for want of equity is affirmed.

DECREE AFFIRMED.

has lost anything by reason of the actions of his guardian, defendant
in error, nor that defendant in error can be held under the proof in
this record to be required to pay any sum to him.
The decree dismissing the cross-bill for want of equity is
affirmed.

DECREE AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

148 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in the year of our Lord one thousand nine hundred and thirty-four, within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

273 I.A. 638²

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures

following, to-wit:

In the Appellate Court of Illinois

Second District

May Term, A.D. 1933.

Elizabeth Morton, a minor,
appellant,

vs.

Appeal from the Circuit Court

Charles E. Hughes,
appellee,

of Winnebago County

DOVE-J.

Appellant, a minor, suing by her father and next friend, recovered a judgment for personal injuries sustained by her while she was riding in an automobile driven by her father when it collided with a tractor owned by appellee.

The declaration consisted of two counts. The first charged general negligence in the management, control and operation of the tractor. The second count averred that appellee parked said tractor in the center of a public road upon which appellant was traveling and negligently burned grass and hay along the westerly side of the road, so that the smoke therefrom completely enveloped the tractor and alleged that no warning of the presence of the tractor was given appellant or her father, and as a result of such negligence the car in which she was riding collided with the tractor. Each count averred that the driver of the car was in the exercise of ordinary care for his safety and the safety of his automobile and passengers, and that appellant herself was in the exercise of due care for her own personal safety, that she was twelve years of age at the time of the collision, and as a result thereof suffered numerous serious injuries and had expended and become liable to expend large sums of money and would be obliged to expend large sums of money in the future in endeavoring to be cured of said

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injuries. That her father and mother had assigned, transferred and relinquished their right to recover for moneys expended and to be expended in the future for medical treatment for appellant to her, and that they had assigned, transferred and relinquished to appellant their right to recover her wages and earnings during her minority. Appellee plead the general issue and the cause was tried by a jury resulting in a verdict for \$500.00 in favor of appellant, upon which, after a motion for a new trial was denied, judgment was rendered and the plaintiff below brings the record to this court for review by appeal.

The evidence discloses that about four o'clock in the afternoon of July 21, 1931, the father of appellant was driving his automobile from Morrison to his home in Geneva, accompanied by his daughter, Elizabeth, appellant, who was then twelve years of age, and by Virginia Richards, a girl about the same age as Elizabeth. All three were in the front seat. Appellee was a contractor and had a number of workmen employed repairing a gravel road near Byron. The car in which appellant was riding had been proceeding along Route 72 but left it near Byron, turning south upon this gravel road. Several of appellee's employees were burning grass and weeds along the west side of this road, preparatory to grading it, and between five hundred and six hundred feet in length along the sides of the road had been burned when the Morton car left Route 72 and turned south. According to the testimony of the witnesses for appellee, before travellers from the north would reach the place where the fire was burning, a barricade had been erected and a red flag and a sign had been placed warning travellers that men were working upon the road and that persons traveled it at their own risk. Mr. Morton testified that he did not observe the barricade or signs, and according to his testimony, the smoke from the burning grass grew very dense as he proceeded south and he reduced his speed to about

injuries. That her father and mother had assisted, transferred and relinquished their right to recover for monies expended and to be expended in the future for medical treatment for appellant to her, and that they had assigned, transferred and relinquished to appellant their right to recover her wages and earnings during her minority. Appellee pled the general issue and the cause was tried by a jury resulting in a verdict for \$500.00 in favor of appellant, upon which, after a motion for a new trial was denied, judgment was rendered and the plaintiff below brings the record to this court for review by appeal.

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ten miles per hour and was driving on the right side of the road, when suddenly he saw the five ton Holt caterpillar tractor of appellee, enveloped in smoke, standing in the highway about three feet west of the center of the road. As a result of the collision which ensued, appellant was rendered unconscious and sustained injuries principally to her jaws, mouth and teeth.

It is first insisted by appellant that the court erred in sustaining objections to questions asked Dr. Payne, a dentist who testified in her behalf on the subject of expenses for dental treatments and surgery resulting from appellant's injuries.

Dr. Payne testified that the treatments he gave appellant were the outgrowth of this collision, and that he had made a charge therefor but was not permitted to state whether or not he had an opinion as to what the usual, ordinary and customary charge for the dental work he had done or whether the witness was familiar with the charges for such work in and around Chicago, nor was he permitted to state his charge for the necessary dental service which he rendered appellant from the time of the collision to the time of the trial. In our opinion this was not a proper subject of inquiry and the court did not err in sustaining objections to this line of questions. *Meece v. Holland Furnace Co.* 269 Ill. App. 164 and cases therein cited. *Masche v. Gitchell*, etc., Gen. No. 8702, opinion filed in this court January 19, 1934.

While the declaration charged that the father and mother of appellant had assigned, transferred and relinquished to her their right to recover for moneys expended and to be expended in the future for medical treatment for her and that they had assigned, transferred and relinquished to her their right to recover her wages and earnings, no proof of these allegations had been offered and the rule as stated in 31 C. J. 1114 Sec. 252 is that ordinarily an infant suing for personal injuries cannot recover for expenses in curing his injuries when he is under the control of his parents. The record in this

ten miles per hour and was driving on the right side of the road, when suddenly he saw the five ton Holt Caterpillar tractor of appellee, enveloped in smoke, standing in the highway about three feet west of the center of the road. As a result of the collision which ensued, appellee was rendered unconscious and sustained injuries principally to her jaws, mouth and teeth.

It is first insisted by appellee that the court erred in sustaining objections to questions asked Dr. Payne, a dentist who testified in her behalf on the subject of expenses for dental treatments and surgery resulting from appellee's injuries.

Dr. Payne testified that the treatments he gave appellee were the outgrowth of this collision, and that he had made a charge therefor but was not permitted to state whether or not he had an opinion as to what the usual, ordinary and customary charge for the dental work had done or whether the witness was familiar with the charges for such work in and around Chicago, nor was he permitted to state his charge for the necessary dental service which he rendered appellee from the time of the collision to the time of the trial. In our opinion this was not a proper subject of inquiry and the court did not err in sustaining objections to this line of questions. *Meece v. Holland Furnace Co.*, 289 Ill. App. 164 and cases therein cited. *Masche v. Githell*, etc., Gen. No. 8702, opinion filed in this court January 19, 1934.

While the declaration charged that the father and mother of appellee had assigned, transferred and relinquished to her their right to recover for moneys expended and to be expended in the future for medical treatment for her and that they had assigned, transferred and relinquished to her their right to recover her wages and earnings, no proof of these allegations had been offered and the rule as stated in 31 C. J. 1114 Sec. 252 is that ordinarily an infant suing for personal injuries cannot recover for expenses in curing his injuries when he is under the control of his parents. The record in this

court discloses that no attempt was ever made by appellant to prove the allegations of her declaration to the effect that her parents had relinquished their right to recover for moneys expended and to be expended in her behalf and the record further discloses that subsequent to the return of the verdict by the jury leave was asked and obtained by appellant to amend her declaration by eliminating these allegations therefrom and such an amendment was made. Dr. Payne was permitted to testify as to what future dental services would be necessary to be rendered appellant but the court very properly sustained an objection to the question as to whether the witness had an opinion as to what such future treatments might cost.

Appellant next contends that the court committed reversible error in giving several instructions on behalf of appellee. The third instruction is as follows, viz;- "The court instructs the jury that the more dangerous a place is known to be the more care and caution is required by one approaching or crossing the same, and the court instructs the jury that while approaching and going upon a country highway that is undergoing repair, then such person is required by law to exercise care in proportion to the apparent danger of such situation." The criticism of this instruction is that the word "crossing" has no place therein, that the reference to "such person" might be understood by the jury to be the driver of the car, that the highway was not inherently dangerous, and that the instrumentality which brought about the collision in this case was an unguarded tractor enveloped in smoke. This instruction advised the jury that the more dangerous a place is known to be, the more care and caution is required by one approaching or crossing the dangerous place. Appellant did not know of the presence of the tractor, but there was evidence in the record that there were warnings along this highway placed there for the purpose of advising travelers of the

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fact that the road was undergoing repairs, and while the negligence of the driver of the car could not be imputed to appellant, the jury was correctly advised in other instructions of the proper degree of care required of her which was such as an ordinarily prudent girl of her age, capacity, experience, education and intelligence would exercise under the same or similar circumstances. *Maskaliunas v. C. & W. R. R. Co.*, 318 Ill. 142. The instruction is abstract and should not have been given, but it was not reversible error, in our opinion, to give it.

Instruction No. Six is as follows: "The court instructs the jury that the mere fact that the plaintiff received an injury is no evidence in itself of negligence on the part of the defendant, nor is it evidence in itself of the exercise of due care on the part of the plaintiff". Appellant insists that this instruction is argumentative in that it singles out the injury to the plaintiff and then tells the jury that the injury was no evidence of the negligence of the defendant, and calls our attention to *Cohen v. Weinstein*, 231 Ill. App. 84, and *Pennsylvania Co. v. Roberts & Schaefer Co.*, 250 Ill. App. 330. In *Cohen v. Weinstein*, supra, the court gave an instruction in part as follows, viz:- "The court instructs the jury that the mere happening of the occurrence in question in and of itself raises no presumption of negligence on the part of the defendant". In holding this part of the instruction bad, the court said, "It was error to tell the jury that the mere happening of the occurrence in question raised no presumption of negligence. We do not think that it can be said in the case at bar, as a matter of law, that no presumption of negligence arose from the mere happening of the occurrence. The question was one of fact for the jury. *West Chicago St. R. Co. v. Petters*, 196 Ill. 298; *Hartrich v. Hawes*, 202 Ill. 334; *Penna Co. v. McCaffrey*, 173 Ill. 169." In *Pennsylvania Co. v. Roberts & Schaefer Co.*, supra, it was held

fact that the road was undergoing repairs, and while the negligence of the driver of the car could not be imputed to appellant, the jury was correctly advised in other instructions of the proper degree of care required of her which was such as an ordinarily prudent girl of her age, capacity, experience, education and intelligence would exercise under the same or similar circumstances. *Mackelinnus v. O. & W. R. Co.*, 318 Ill. 143. The instruction is abstract and should not have been given, but it was not reversible error, in our opinion, to give it.

Instruction No. 21 is as follows: "The court instructs the jury that the mere fact that the plaintiff received an injury is no evidence in itself of negligence on the part of the defendant, nor is it evidence in itself of the exercise of due care on the part of the plaintiff." Appellant insists that this instruction is argumentative in that it singles out the injury to the plaintiff and then tells the jury that the injury was no evidence of the negligence of the defendant, and calls our attention to *Cohen v. Weinstein*, 331 Ill. App. 84, and *Pennsylvania Co. v. Roberts & Schaefer*, 330 Ill. App. 330. In *Cohen v. Weinstein*, supra, the court gave an instruction in part as follows, viz: - "The court instructs the jury that the mere happening of the occurrence in question in and of itself raises no presumption of negligence on the part of the defendant." In holding this part of the instruction bad, the court said, "It was error to tell the jury that the mere happening of the occurrence in question raised no presumption of negligence. We do not think that it can be said in the case at bar, as a matter of law, that no presumption of negligence arose from the mere happening of the occurrence. The question was one of fact for the jury." *West Chicago St. R. Co. v. Petters*, 196 Ill. 298; *Harrison v. Hawes*, 303 Ill. 334; *Penna Co. v. McCaffrey*, 173 Ill. 169. In *Pennsylvania Co. v. Roberts & Schaefer Co.*, supra, it was held

that instructions which told the jury in effect that the mere happening of the accident by which a party was injured raised no presumption of negligence on the part of the defendant were erroneous.

The court in *West Chicago St. Ry. v. Petters*, 196 Ill. 298, at page 300, in approving the action of the trial court in a personal injury case, in refusing an instruction, as follows, viz;- "The court instructs the jury that no presumption of negligence arises against the defendant from the mere fact, of itself, that the plaintiff was injured in connection with the defendant's cars", said, "If an instruction of this nature were held proper, it would be possible for a defendant to select each mere fact constituting the entire chain of facts by which negligence was proved and enable the court to instruct the jury that each of these links in the chain did not, of itself, constitute negligence, and while each particular link might not, of itself, constitute negligence, yet the whole, taken together, would, and thereby the court would be enabled to instruct the jury on the facts and take away the consideration of facts from them". An instruction in *Vaughan v. Director General of Railroads*, 218 Ill. App. 595, told the jury that the mere fact that an engine passed the barn before the fire was discovered does not render the defendant liable, and it was held erroneous as the tendency of the instruction was to cause the jury, in considering the evidence, to reject the fact that the engine passed the barn shortly before the fire was discovered and it was misleading as it might cause the jury to suppose that the matters thus specially called to their attention are the ones to be specially considered, and are matters of controlling importance.

The question of negligence on the part of a defendant in a personal injury case is one of fact for the jury to determine, and it should always be proper for the jury to consider the nature of the accident in determining that question, and as this instruction

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The question of negligence on the part of a defendant in a personal injury case is one of fact for the jury to determine, and it should always be proper for the jury to consider the nature of the accident in determining that question, and as this instruction

selected one fact disclosed by the evidence and stated that a certain conclusion does not follow as a matter of law from that it should have been refused. However, the instruction in the instant case is not the same as the instructions passed upon in the Cohen and Pennsylvania Company cases supra, as in those cases it was stated that the happening of the accident in itself did not raise a presumption of negligence, while in the instant case the instruction refers to the injury. Furthermore, in *Martini v. Donk Brothers Coal & Coke Company*, 169 Ill. App. 139, the court said that barring the use of the word "accident", the following instruction would have been proper, viz: "The court instructs you that you have no right to regard the defendant as negligent in this case simply because the plaintiff was injured. The mere accident to the plaintiff in this case is of itself no evidence of negligence on the part of the defendant."

Instruction No. Seven was as follows: "The jury are instructed that if they believe from the evidence that the place where the accident occurred to the plaintiff was more dangerous than the ordinary country road and that the plaintiff knew of such condition, or by the exercise of that degree of care and caution that an ordinarily prudent girl of her age, capacity, experience, education and intelligence would exercise under the same or similar circumstances, should have so known, then she is bound to use ordinary care and intelligence to avoid the accident, taking into consideration such knowledge, and if in such case, she failed to use such care and diligence in proportion to such danger, she can not recover".

The objection appellant makes to this instruction is that it requires the jury to compare the highway upon which appellant was traveling with the ordinary country road. The jury was told in this instruction, so appellant insists, to first determine how dangerous an ordinary country road was, and then to ascertain from the evidence in this case whether the highway upon which appellant

selected one fact disclosed by the evidence and stated that a certain conclusion does not follow as a matter of law from that fact should have been refused. However, the instruction in the instant case is not the same as the instructions passed upon in the *Goetz* and *Pennsylvania Company* cases supra, as in those cases it was stated that the happening of the accident in itself did not raise a presumption of negligence, while in the instant case the instruction refers to the injury. Furthermore, in *Martini v. Donk Brothers Coal & Coke Company*, 189 Ill. App. 138, the court said that barring the use of the word "accident", the following instruction would have been proper, viz: "The court instructs you that you have no right to regard the defendant as negligent in this case simply because the plaintiff was injured. The mere accident to the plaintiff in this case is of itself no evidence of negligence on the part of the defendant."

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The objection appellant makes to this instruction is that it requires the jury to compare the highway upon which appellant was traveling with the ordinary country road. The jury was told in this instruction, as appellant insists, to first determine how dangerous an ordinary country road was, and then to ascertain from the evidence in this case whether the highway upon which appellant

was traveling was more dangerous than the standard which each juror might fix in his own mind as to what an ordinary country road should be. These criticisms leave out of consideration the fact that jurors are men of affairs and have a reasonable acquaintanceship with every day affairs and while the instruction might have been more accurately drawn, we do not believe the jury was misled thereby. The settled law in this state is that it was the duty of appellee to use reasonable care and diligence to warn persons who might use the highway of any dangers there might be in such use and guard persons, as far as may be reasonably practical, against the damages that result from the work of the improvement while it is being carried on. *Allen v. McCalman*, 229 Ill. App. 221. And it was likewise the duty of appellant to use that degree of care as set forth in the instruction to ascertain the condition of the highway upon which she was traveling.

Instruction No. Eight given at the request of appellee is as follows:- "The court instructs the jury that if you believe, from the evidence, that the plaintiff, in going upon the highway in question, was guilty of negligence in failing to use proper care and caution that an ordinary prudent girl of her age, capacity, experience, education and intelligence would exercise under the same or similar circumstances, and if the jury further believe from the evidence that such negligence of the plaintiff was the proximate cause of the injuries sustained by the plaintiff, then you should find the defendant not guilty".

This instruction, so counsel for appellant argue, refers to appellant in going upon the highway in question and it directs a verdict if the jury should find that she negligently entered upon the highway at all. We do not believe an ordinary jury would so understand this instruction. This instruction concluded by stating that under certain conditions the jury should find the defendant

as traveling was more dangerous than the standard which each juror might fix in his own mind as to what an ordinary country road should be. These criticisms leave out of consideration the fact that jurors are men of affairs and have a reasonable acquaintance with every day affairs and while the instruction might have been more accurately drawn, we do not believe the jury was misled thereby. The settled law in this state is that it was the duty of a peddler to use reasonable care and diligence to warn persons who might use the highway of any dangers there might be in such use and guard persons, as far as may be reasonably practical, against the damages that result from the work of the improvement while it is being carried on. Allen v. McGowan, 239 Ill. App. 221. And it was likewise the duty of appellant to use that degree of care as set forth in the instruction to ascertain the condition of the highway upon which she was traveling.

Instruction No. Eight given at the request of appellee is as follows: - "The court instructs the jury that if you believe, from the evidence, that the plaintiff, in going upon the highway in question, was guilty of negligence in failing to use proper care and caution that an ordinary prudent girl of her age, capacity, experience, education and intelligence would exercise under the same or similar circumstances, and if the jury further believe from the evidence that such negligence of the plaintiff was the proximate cause of the injuries sustained by the plaintiff, when you should find the defendant not guilty."

This instruction, so counsel for appellant argue, refers to appellant in going upon the highway in question and it directs a verdict if the jury should find that the negligently entered upon the highway at all. We do not believe an ordinary jury would so understand this instruction. This instruction concluded by stating that under certain conditions the jury should find the defendant

not guilty. It must be kept in mind that upon the question of liability, the jury found against appellee and for appellant. The real complaint, if any there be, is that the amount of the verdict returned was inadequate. Ordinarily the extent of the injuries received and the amount of damages sustained is a question of fact for the jury and courts are loathe to interfere in the absence of serious prejudicial error.

We have examined this record with care, and while a more substantial verdict might have been warranted, we feel that the record is free from reversible error and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

not guilty. It must be kept in mind that upon the question of liability, the jury found against appellee and for appellant. The real complaint, if any there be, is that the amount of the verdict returned was inadequate. Ordinarily the extent of the injuries received and the amount of damages sustained is a question of fact for the jury and courts are loathe to interfere in the absence of serious prejudicial error.

We have examined this record with care, and while a more substantial verdict might have been warranted, we feel that the record is free from reversible error and the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,

SECOND DISTRICT

} ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and

for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby
certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause,
of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said
Appellate Court, at Ottawa, this _____ day of
_____ in the year of our Lord one thousand nine
hundred and thirty-_____

Clerk of the Appellate Court

149 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 I.A. 638⁴

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, A. D. 1933.

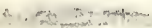
CHARLES IND,
Appellee

vs.

LARGURA CONSTRUCTION COMPANY,
INCORPORATED,

Appellant

APPEAL FROM THE CIRCUIT COURT
OF WINNEBAGO COUNTY

DOVE-J. 

Appellant had a contract to build the Rockford Post Office Building, and employed appellee to do the excavating, filling, grading and certain other work as specified under paragraphs 66 to 87 inclusive of appellant's contract with the United States, except that the trenches for the footings were to be finished by hand by appellant after the excavation was taken out in the rough by appellee, and trenches for small curb footings were to be taken out by appellant, but appellee was to remove from the site any surplus material remaining. The written contract further provided that the parties thereto would be bound by the terms of the agreement, general conditions, drawings and specifications of appellant's contract with the government, so far as applicable and that appellee should make all claims for extras in the same manner that appellant was required by his general contract to make his claim for extras except that the time for making claims for extras should be one week. The contract price was \$3670.00, and the agreement further provided for a bonus of \$50.00 per day for each day less than twenty-nine employed in the work, and likewise provided a penalty of \$50.00 per day for each day over twenty-nine required to complete the job. Of the contract price appellant has paid \$2555.05, leaving an unpaid balance of \$1114.95 and this suit in assumpsit was instituted by appellee to recover that amount, to-

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
October Term, A. D. 1933.

APPEAL FROM THE CIRCUIT COURT
OF WINNEBAGO COUNTY

HARLES IND,
Appellee

vs.

ARGURA CONSTRUCTION COMPANY,
INCORPORATED,

Appellant

OVER-1, 1933

Appellant had a contract to build the Rockford Post Office building, and employed appellee to do the excavating, filling, grading and certain other work as specified under paragraphs 66 to 67 inclusive of appellant's contract with the United States, except that the trenches for the footings were to be finished by hand by appellant after the excavation was taken out in the rough by appellee, and trenches for small curb footings were to be taken out by appellant. Appellee was to remove from the site any surplus material remaining. The written contract further provided that the parties thereto should be bound by the terms of the agreement, general conditions, drawings and specifications of appellant's contract with the government, so far as applicable and that appellee should make all claims for extras in the same manner that appellant was required by his general contract to make his claim for extras except that the time for making claims for extras should be one week. The contract price was \$270.00, and the agreement further provided for a bonus of \$50.00 per day for each day less than twenty-nine employed in the work, and likewise provided a penalty of \$50.00 per day for each day over twenty-nine employed to complete the job. Of the contract price appellant has paid \$2352.05, leaving an unpaid balance of \$1114.95 and this suit was instituted by appellee to recover that amount, to-

gether with \$500.00 bonus for completing his contract before the expiration of the time specified, and for \$1770.00 extra work not included in the contract. These items aggregate \$3384.95, and the trial below resulted in a verdict and judgment for that amount and the record is brought to this court for review by appeal.

Appellant insists that there was no extra work done, but that everything that was done was within the provisions of the written agreement and therefore there can be no recovery for extras. That if there was any extra work done, no written claim was ever made therefor within seven days as provided by the contract and that appellee is not entitled to recover the balance of the contract price or a bonus because the work was not completed within the twenty-nine day period.

Appellee testified that the extra excavating he did was the area in the front and east side of the building, the areaway on the north side, the retaining walls on the north and south sides and the filling of the basement with the dirt which had been taken out too deep: that according to the contract, he was to do no excavating except under the main part of the post office building and this was finished within seventeen or eighteen days after the date of the contract but no part of the extra work was done within the twenty-nine day period. In addition to this evidence the trial court admitted evidence, offered by appellee, of conversations and negotiations prior to the execution of the contract, the purpose of such evidence being to show that the contract, including these writings and drawings which are a part of the contract, by reference, did not provide for any excavating except the main basement. What a contract means is always a question of law, *Graham vs. Sadler*, 165 Ill. 95 and the construction of a written contract is for the court. *Rosenbaum Bros. v. Devine*, 271 Ill. 354. This written contract purported to be a complete and final statement of the entire transaction and it is the only evidence of its terms and conditions. *Osgood vs. Skinner*, 211 Ill. 229. *Davis vs. The Fidelity Fire Ins. Co.*, 208 Ill. 375.

In the instant case the contract provided that appellee should do all the excavating, filling and grading not only in accord-

together with \$500.00 bonus for completing his contract before the expiration of the time specified, and for \$1770.00 extra work not included in the contract. These items aggregate \$3334.95, and the trial below resulted in a verdict and judgment for that amount and the record is brought to this court for review by appeal.

Appellant insists that there was no extra work done, but that everything that was done was within the provisions of the written agreement and therefore there can be no recovery for extras. That if there was any extra work done, no written claim was ever made therefor within seven days as provided by the contract and that appellee is not entitled to recover the balance of the contract price or a bonus because the work was not completed within the twenty-nine day period.

Appellee testified that the extra excavating he did was the area in the front and east side of the building, the driveway on the north side, the retaining walls on the north and south sides and the filling of the basement with the dirt which had been taken out too deep: that according to the contract, he was to do no excavating except under the main part of the post office building and this was

finished within seventeen or eighteen days after the date of the contract but no part of the extra work was done within the twenty-nine day period. In addition to this evidence the trial court admitted evidence, offered by appellee, of conversations and negotiations prior to the execution of the contract, the purpose of such evidence being to show that the contract, including these writings and drawings which are a part of the contract, by reference, did not provide for any excavating except the main basement. That a contract

means is always a question of law, *Graham vs. Radler*, 185 Ill. 93 and the construction of a written contract is for the court. *Rosenbaum Bros. v. Devine*, 271 Ill. 354. This written contract purported to be a complete and final statement of the entire transaction and it is the only evidence of its terms and conditions. *Good vs. Skinner*, 211 Ill. 329. *Davis vs. The Midway Fire Ins. Co.*, 208 Ill. 375.

In the instant case the contract provided that appellee should do all the excavating, filling and grading not only in accord-

ance with the conditions of the contract between appellant and the Government, but also in accordance with the drawings and specifications prepared by Peterson and Johnson, architects of Rockford. These plans and specifications are as much a part of the contract as if written into or attached to it. City of Lakeview v. MacRitchie, 134 Ill. 203; Kraft v. Grider, 221 Ill. App. 467.

The proposition that parol evidence is not admissible to change or alter the terms of a written contract does not require the citation of authority. This is a suit upon a written contract and all evidence of prior talks or negotiations and whether appellee understood he was only to excavate seventeen thousand yards or twenty-six thousand yards would inject into this contract a meaning different from the meaning to be derived from the language finally used by the parties and should have been excluded.

The instruction complained of is as follows: "The jury is instructed that a contract may be rescinded in part, or different provisions made by consent of all the contracting parties, and if the jury believe from the evidence that the plaintiff performed services for the defendant or its authorized agents, which were not called for in the contract admitted in evidence, then you will find for the plaintiff in such a sum as you believe from a preponderance of the evidence that the defendant is indebted to the plaintiff". This instruction should have been refused. There is no evidence in the record that the contract was rescinded in part, or different provisions made by consent of all the contracting parties. The instruction assumes the existence of those things, but there is nothing in the evidence upon which to base these assumptions. Furthermore, what services are called for by the contract are, by this instruction submitted to the jury. That question is for the determination of the court. The court should have instructed the jury what services were covered by this contract, and for its failure to do so and for erroneously admitting improper evidence, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED

ances with the conditions of the contract between appellant and the Government but also in accordance with the drawings and specifications prepared by Peterson and Johnson, architects of Rockford. These plans and specifications are as much a part of the contract as if written into or attached to it. City of Lakeview v. Meschitsch, 134 Ill. 208; Kraft v. Grider, 221 Ill. App. 487.

The proposition that parol evidence is not admissible to change or alter the terms of a written contract does not require the citation of authority. This is a rule upon a written contract and all evidence of prior talks or negotiations and whether appellee understood he was only to excavate seventeen thousand yards or twenty-six thousand yards would inject into this contract a meaning different from the meaning to be derived from the language finally used by the parties and should have been excluded.

The instruction complained of is as follows: "The jury is instructed that a contract may be rescinded in part, or different provisions made by consent of all the contracting parties, and if the jury believe from the evidence that the plaintiff performed services for the defendant or its authorized agents, which were not called for in the contract admitted in evidence, then you will find for the plaintiff in such a sum as you believe from a preponderance of the evidence that the defendant is indebted to the plaintiff." This instruction should have been refused. There is no evidence in the record that the contract was rescinded in part, or different provisions made by consent of all the contracting parties. The instruction assumes the existence of those things, but there is nothing in the evidence upon which to base these assumptions. Furthermore, what services are called for by the contract and by this instruction submitted to the jury. The question is for the determination of the court. The court should have instructed the jury what services were covered by this contract, and for its failure to do so and for erroneously admitting improper evidence, the judgment is reversed and the case remanded.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

E. J. WELTER, Sheriff.

273 L.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the

Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1932

CHARLES H. WESTLAKE, DUANE W.
OVERTON, LOUISA M. WINN, IDA M.
WESTLAKE,

Defendants in error

vs.

ERROR TO
CIRCUIT COURT
McHENRY COUNTY.

JOSEPH BROWN, ET AL., (JAMES
FRISBY, ET AL., Plaintiffs in
error.)

HUFFMAN-J.

This was a bill in chancery, filed by defendants in error in the circuit court of McHenry County, on July 30, 1931, against the plaintiffs in error to enforce the constitutional stockholders' liability against plaintiffs in error, as stockholders in the Spring Grove State Bank of Spring Grove, Illinois. The suit was brought on behalf of defendants in error and all other creditors of said bank who might choose to join with them. The answers filed by plaintiffs in error denied that any liability had accrued to the defendants in error by virtue of Section 6, of Article 2 of the Constitution of the State of Illinois; denied that stockholders' liabilities had matured; denied that a right of action had then accrued to defendants in error to bring such suit; and denied the right of defendants in error to maintain the action on behalf of themselves and other creditors. Plaintiffs in error further charge that it did not appear in the bill of complaint when the various parties became stockhold-

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WESTLAND
OVERTON, LOUISA M. IDA
CHARLES H. WESTLAND, LOUISA M.

Defendants in error

OF ROYALTY
THREE THIRTY
YUJONG YUJONG

87

JOSEPH BROTH, ET AL., Plaintiffs in
CRIME, ET AL., Plaintiffs in

7-KANTUH

This was a bill in equity, filed by respondents in error in the circuit court of Henry County, on July 20, 1931, against the plaintiffs in error to enforce the constitutional stockholders' liability against plaintiffs in error, as stockholders in the Spring Grove State Bank of Spring Grove, Illinois. The suit was brought on behalf of defendants in error and all other creditors of said bank who might choose to join with them. The answers filed by plaintiffs in error denied that any liability had accrued to the defendants in error by virtue of action 6, of article 2 of the Constitution of the State of Illinois; denied that stockholders' liability had accrued; denied that a right of action had then accrued to defendants in error to bring such suit; and denied the right of respondents in error to maintain the action on behalf of themselves and other creditors. Plaintiffs in error further allege that it did not appear in the bill of complaint when the various parties became stockholders.

ers in said bank, nor when the liability claimed by defendants in error accrued. Plaintiffs in error further denied stockholders' liability for the amounts as claimed and set forth in the bill; and charge that the assets of the defunct bank should first be liquidated and distributed among the creditors before stockholders' liability could be enforced, or this action maintained.

Upon a hearing, the court found the persons who were stockholders at the time of the closing of the bank, together with the respective number of shares then owned by each; the names of the stockholders who had already paid their stock liability, together with the amounts so paid; and further, that the defendants in error were creditors of the bank at the time of its closing, as claimed; that the defendants in error were entitled to maintain their action and to enforce the stockholders' liability as therein sought. The court found each of the plaintiffs in error was a stockholder at the time of the closing of said bank and entered judgment against each individually according to the number of shares of stock held at the time of such closing.

Plaintiffs in error prosecute this writ of error, urging three grounds for the reversal of this case. They first urge that the bill of complaint did not set out the time when the liability to defendants in error accrued, or that it accrued during the time the plaintiffs in error were stockholders; and that the decree also failed to show this. After a careful examination of the record, we can not agree with this contention of plaintiffs in error. It is next urged that the court erred by admitting in evidence a certified copy of the decree entered in the circuit court of McHenry county, as rendered by the court in the proceeding by the Auditor of Public Accounts against said bank wherein receivership originated, upon the Auditor's bill. An inspection of the record discloses that all

ers in said bank, nor when the liability of said bank was ascertained in error occurred. Plaintiffs in error further claim that the holders' liability for the amounts as claimed and received in the bill; and state that the assets of the bank were sold at a liquidation and distributed among the creditors before the stockholders' liability could be ascertained, or this action maintained.

Upon a hearing, the court found the facts and that the stockholders at the time of the closing of the bank, together with the respective number of shares then owned by each; the names of the stockholders who had already sold their stock liability, together with the amounts so paid; and further, that the defendants in error were creditors of the bank at the time of its closing, as claimed; that the defendants in error were entitled to maintain their action and to enforce the stockholders' liability as therein sought. The court found each of the plaintiffs in error was a stockholder at the time of the closing of said bank and entered judgment against each individually according to the number of shares of stock held at the time of such closing.

Plaintiffs in error prosecute this writ of error, urging three grounds for the reversal of this case. They first urge that the bill of complaint did not set out the time when the liability to defendants in error occurred, or that it appeared during the time the plaintiffs in error were stockholders; and that the decree was failed to state that. After a careful examination of the record, we are not aware of any error in the bill of plaintiffs in error. It is not urged that the defendants by admitting in evidence a certified copy of the balance entered in the circuit court of Henry county, as verified by the court in the proceeding by the action of John's associates against said bank wherein recoveries originated, were the Auditor's bill. As the action of the court declared that bill

of the essential things as contained in the decree of the original case, so introduced herein, were duly set forth in the bill of complaint in this case and were proven as a matter of law and fact. If it was error to introduce the decree of the former proceeding, it was harmless error. The third ground for reversal urged by plaintiffs in error is to the effect that no proof was made that the plaintiffs in error were stockholders at the time any of the liabilities of said bank accrued. We can not agree with this contention. The bill and decree herein appear to be in the usual and ordinary form, and are supported by the facts.

The court after making its finding as against the ~~stockholders~~ at the time of the closing of the bank, which included the plaintiffs in error, further expressly provided that the question of the liability of former stockholders, who had sold and disposed of their shares of stocks, prior to the closing of the bank, was reserved for the future consideration of the court. This contingency has been answered since the hearing of this cause, in the case of Sanders v. Merchants State Bank, 349 Ill. 547. The contentions of plaintiffs in error herein, we believe to be answered in the following cases: Golden v. Cervenka 278 Ill. 409; American National Bank v. Holsen, 331 Ill. 622; Babka Plastering Co. v. City State Bank of Chicago, 264 Ill. App. 142; and Sanders v. Merchants State Bank, supra.

We are of the opinion that defendants in error had the legal right to maintain their bill as filed in this case, and that the circuit court of McHenry county did not err in its judgment herein.

The judgment of the circuit court is affirmed.

Judgment affirmed.

of the essential facts as contained in the report of the jury-
 trial case, as introduced a trial, were duly set forth in the
 bill of complaint in this case and were proved by a majority of
 the jury. It is not to be understood that the jury were of the
 former proceeding, it was necessary error. The third ground
 for reversal urged by plaintiff is error in the verdict that
 no proof was made that the plaintiff's error was attributable
 to the time and of the liabilities of said bank occurred.
 We are not agreed with this contention. The bill and decree
 herein appear to be in the usual and ordinary form, and are
 supported by the facts.

The court after stating its opinion is against
 the defendants at the time of the closing of the bank, which
 included the plaintiff in error, further expressly provided
 that the question of the liability of former stockholders, who
 had sold and disposed of their shares of stock, prior to the
 closing of the bank, was reserved for the future consideration
 of the court. This contingency has been answered since the
 hearing of this cause, in the case of *Bankers v. Merchants*
State Bank, 249 Ill. 517. The consideration of plaintiff's
 error herein, we believe to be answered in the following cases:
Olson v. Northern Trust & Savings Bank, 228 Ill. 403;
Holman, 231 Ill. 522; Bankers Trust Co. v. City State Bank,
of Chicago, 234 Ill. 122; and Anderson v. Merchants State
Bank, supra.

The day of the opinion and judgment in error was
 the legal right to maintain their bill as filed in this case, and
 that the circuit court of Henry county did not err in its
 judgment herein.

The judgment of the circuit court is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I. JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

151 7
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the sixth day of February, in
the year of our Lord one thousand nine hundred and thirty-four,
within and for the Second District of the State of Illinois:

Present-- The Hon. FRED G. WOLFE, Presiding Justice.

Hon. FRANKLIN R. DOVE, Justice.

Hon. BLAINE HUFFMAN, Justice.

JUSTUS L. JOHNSON, Clerk.

273 I.A. 639'

E. J. WELTER, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: On

FEB 19 1934 the opinion of the Court was filed in the
Clerk's office of said Court, in the words and figures
following, to-wit:

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
February Term A. D. 1932

IN THE MATTER OF THE STATE

OF

ELIZABETH SWALM, DECEASED

(Hattie Wagner Crosby)

Appeal from the
Circuit Court of
Will County.

Appellant.

Per Curiam;

This cause was initiated when Hattie Wagner Crosby, appellant, listed in an Inventory filed by her as Executrix of the Last Will and Testament of Elizabeth Swalm, deceased, in the Probate Court of Will County, six notes secured by trust deeds, with a foot-note that said notes had been delivered to her in payment for services rendered to the decedent but that the right to the said notes having been questioned by Mable Swalm Field, appellee herein, she desired that their ownership be determined by the Court. It appears that Mable Swalm Field was a sister of Elizabeth Swalm and a residuary legatee under the Will of Elizabeth Swalm, deceased. Later on, it appears the appellant filed a petition, unverified, setting forth that the Inventory disclosed matters in dispute and praying that the Court set the matter down for a hearing. The matter was heard in the Probate Court of Will County where it was held that the notes were the property of the appellant and not property belonging to the estate of Elizabeth Swalm, deceased, from which order and conclusion of the Probate Court an appeal was prosecuted to the Circuit Court of Will County, where the matter was submitted by stipulation of the parties on the transcript of the proceedings had in the Probate Court.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
February Term A. D. 1932

IN THE MATTER OF THE ESTATE
OF
ELIZABETH SWAIN, DECEASED
(Hattie Wagner Crosby)
Appellant.
Appeal from the
Circuit Court of
Will County.

Per Curiam;

This case was initiated when Hattie Wagner Crosby, appellant, listed in an inventory filed by her as executrix of the last will and testament of Elizabeth Swain, deceased, in the Probate Court of Will County, six notes secured by trust deeds, with a foot-note that said notes had been delivered to her in payment for services rendered to the decedent but that the right to the said notes having been questioned by Mable Swain Wield, appellee herein, she desired that their ownership be determined by the Court. It appears that Mable Wield was a sister of Elizabeth Swain and a residuary legatee under the will of Elizabeth Swain, deceased. Later on, it appears the appellant filed a petition, unverified, setting forth that the inventory filed closed matters in dispute and praying that the Court set the matter down for a hearing. The matter was heard in the Probate Court of Will County where it was held that the notes were the property of the appellant and not property belonging to the estate of Elizabeth Swain, deceased, from which order and conclusion of the Probate Court an appeal was prosecuted to the Circuit Court of Will County, where the matter was submitted by stipulation of the parties on the transcript of the proceedings had in the Probate Court.

On the hearing in the Circuit Court it was found that the notes in question and accrued interest thereon were the property of the Estate of Elizabeth Swalm, deceased, and that the same should be inventoried as part of said estate and that the order and judgment by the Probate Court should be reversed. From this order the said Hattie Wagner Crosby has prosecuted an appeal to this court.

In this court it is insisted by the appellant that she acquired the title to the notes in question by a gift. It appears that it was insisted in the court below that the notes were given in payment for services rendered. The question to be determined in view of the contention of the appellant is whether or not the notes were a gift to her. The appellant had been the agent and representative of Elizabeth Swalm for some considerable length of time prior to her death. The record fails to disclose when or how the six notes in controversy came into the possession of the appellant.

In the Probate Court where the record was made on which this case was tried in the Circuit Court appellee introduced no oral testimony except the identification of the signature of the appellant to two letters written by her to the deceased Elizabeth Swalm, when the latter was in Colorado. The letters bear date of October 27th, 1928, and of January 23rd, 1929, and mention notes in accounting for interest collected thereon as the agent of the testatrix. Each of the letters recites collection of several items of interest on various securities owned by the deceased, Elizabeth Swalm. In the letter of October 27th, appellant acknowledges collection of \$354.64 in interest on eleven separate claims and \$200.00 principal. A partial remittance of this money it appears was made to Elizabeth Swalm and a part thereof retained. The letter of January 23rd, 1929, refers to another letter of accounting and remittances of November 21st, 1928. In this

On the hearing in the Circuit Court it was found that

the notes in question and secured interest thereon were the property of the estate of Elizabeth Swain, deceased, and that the same should be inventoried as part of said estate and that the order and judgment by the Probate Court should be reversed. From this order the said Nettie Warner Groby has prosecuted an appeal to this court.

In this court it is insisted by the appellant that she acquired the title to the notes in question by gift. It is contended that it was insisted in the court below that the notes were given in payment for services rendered. The question to be determined in view of the contention of the appellant is whether or not the notes were a gift to her. The appellant had been the agent and representative of Elizabeth Swain for some considerable length of time prior to her death. The record fails to disclose when and how the six notes in controversy came into the possession of the appellant.

In the Probate Court where the record was made on which this case was tried in the Circuit Court appellee introduced oral testimony except the identification of the signature of the appellant to two letters written by her to the deceased Elizabeth Swain, when the latter was in Colorado. The letters bear date of October 27th, 1928, and of January 23rd, 1929, and mention notes in account for interest collected thereon as the agent of the testatrix. Each of the letters recites collection of several items of interest on various securities owned by the deceased, Elizabeth Swain. In the letter of October 27th, appellee acknowledges collection of \$24.84 in interest on eleven accounts of \$100.00 principal. A partial remittance of this money it appears was made to Elizabeth Swain and a gift thereof testified. The letter of January 23rd, 1929, refers to another letter of accounting and remittances of November 1st, 1928. In this

communication the appellant credited herself with the remittances made direct to Elizabeth Swalm and payments of Joliet obligations, accounts for the cashing of further interest coupons of \$546.33 and also of a principal collection of \$700 on a matured note.

It appears that on January 23rd, 1929, appellant had \$1246.33 belonging to Elizabeth Swalm on hand and suggested its investment in loans made through her office. It is apparent from what is disclosed by the record that the appellant was engaged in the real estate and loan business in Joliet and held a considerable part of the investments of Elizabeth Swalm. The securities were in the hands of the appellant after the death of Elizabeth Swalm and when the appellant assumed her duties as executrix. From the record it is quite apparent that the appellant was not only the agent of Elizabeth Swalm but that she sustained a confidential relationship to her.

The testimony of the witnesses relied upon by the appellant to sustain her contention that the notes in controversy were a gift to the appellant fall far short of establishing her contention. There is nothing conclusive from the testimony of the witnesses relied upon by the appellant to establish a gift, as to when or where the alleged gift was made, what the circumstances surrounding it were, whether actual delivery was made, what the donors physical and mental condition was at the time, whether the circumstances showed lack of fraud or undue influence, freedom of the donors will or acceptance of the particular property, whether the donor parted with control or dominion over the notes at the time of the making of the alleged gift, and overshadowing the absence of all these vital elements is the lack of evidence in the record to identify the particular notes claimed as having been the subject of a gift.

In this state of the record it was incumbent on the appellant to prove that the particular property claimed came to her legally by gift. The law imposes upon her the burden of proof.

communication the appellant created herself with the ...
made direct to Elizabeth Swalm and payments of ...
accounts for the ... of \$24.33
and also of a principal collection of 700 on a matured note.
It appears that on January 20th, 1929, appellant had
\$1246.33 belonging to Elizabeth Swalm on hand and suggested its
investment in loans made through her office. It is apparent from
what is disclosed by the record that the appellant was engaged in
the real estate and loan business in Joliet and held a considerable
part of the investments of Elizabeth Swalm. The securities were
in the hands of the appellant after the death of Elizabeth Swalm
and when the appellant assumed her duties as executrix. From the
record it is quite apparent that the appellant was not only the
agent of Elizabeth Swalm but that she sustained a confidential
relationship to her.

The testimony of the witnesses relied upon by the
appellant to sustain her contention that the notes in controversy
were a gift to the appellant fall far short of establishing her
contention. There is nothing conclusive from the testimony of
the witnesses relied upon by the appellant to establish a gift, as
to when or where the alleged gift was made, what the circumstances
surrounding it were, whether actual delivery was made, what the
donors physical and mental condition was at the time, whether the
circumstances showed lack of fraud or undue influence, whether
the donors will or acceptance of the particular property, whether
the donor parted with control or dominion over the notes at the
time of the making of the alleged gift, and overshadowing the
absence of all these vital elements is the lack of evidence in
the record to identify the particular notes claimed as having been
the subject of a gift.

In this state of the record it was incumbent on the
appellant to prove that the particular property claimed came to
her legally by gift. The law imposes upon her the burden of proof.

In re Estate of Wm. Schultz, 209 Ill. App. 580-581, it was held that where an administratrix claims that certain property came to her hands as a gift from the deceased, and not as a part of the estate, the burden is upon her to show by clear proof that the property was a gift. In re Estate of Crawford, 245 Ill. App. 227, the Court uses this language: "To establish a gift inter vivos it is necessary to prove the delivery of the property by the donor to the donee with an intent to pass the title and the greater weight of authority is to the effect that the proof to sustain a gift must be clear and convincing. (Citing Rothwell vs Taylor, 303 Ill. 226-230)." In Peters vs Woods 251 Ill. App. 374, at 375-376, the following rule is announced: The law never presumes a gift and the burden is on the donee to prove by clear and convincing evidence the essential facts of a gift which are the delivery **** with intent to pass the title. The burden is on the donee to prove all facts essential to a valid gift and * * * * the great weight of authority is that the evidence to sustain the gift must be clear and convincing. The mere possession of negotiable instruments payable to the order is not alone evidence of title in the possessor, but the burden is on the possessor to prove his title by showing a delivery to him with intent to pass the title. This rule is also clearly announced in Vol. 28, Corpus Juris, pages 676-678, inclusive, which is as follows: "In order that the rights of creditors may not be prejudiced, that the donor may not be circumvented by fraud, that he may be protected from undue influence and that efficacy may not be given to gifts made under legal incapacity, as well as on other grounds, it is held that gifts inter vivos are watched with caution by the court and that to sustain them the evidence must be clear and convincing * * * in weighing conflicting evidence it is not sufficient that the preponderance turn the scale slightly in favor of the gift. The preponderance must be such as to leave no reasonable room for doubt as to the donor's intentions."

In the Estate of W. J. Schmitt, 209 Ill. App. 580-581, it was held that where an administrative claimant claims that certain property came to her hands as a gift from the decedent, and not as a loan, the estate, the burden is upon her to show by clear proof that the property was a gift. In the Estate of Crawford, 345 Ill. App. 227, the Court uses this language: "To establish a gift there must be necessary to prove the delivery of the property by the donor to the donee with an intent to pass the title and the greater weight of authority is to the effect that the proof to establish a gift must be clear and convincing." (Citing Schmitt vs Taylor, 209 Ill. App. 580-581). In Estate vs Coda 251 Ill. App. 374, at 375-376, the following rule is announced: The law never requires a gift and the burden is on the donee to prove by clear and convincing evidence the essential facts of a gift which are the delivery *** with intent to pass the title. The burden is on the donee to prove all facts essential to a valid gift and * * * the great weight of authority is that the evidence to sustain the gift must be clear and convincing. The mere possession of negotiable instruments payable to the order is not alone evidence of title in the possessor, but the burden is on the possessor to prove his title by showing a delivery to him with intent to pass the title. This rule is also clearly announced in Vol. 28, Corpus Juris, pages 878-879, inclusive, which is as follows: "In order that the rights of creditors may not be prejudiced, the donor may not be circumvented by fraud, that he may be protected from undue influence and that efficacy may not be given to gifts made under legal incapacity, as well as on other grounds, it is held that gifts inter vivos are watched with caution by the courts and that to sustain them the evidence must be clear and convincing." * * * In weighing conflicting evidence it is not sufficient that the preponderance turn the scale slightly in favor of the gift. The preponderance must be such as to leave no reasonable room for doubt as to the donor's intention."

While it is true that the record discloses that some two or three witnesses testified that Elizabeth Swalm told them that she had made a gift or was going to make a gift to the appellant of some notes, no notes of any kind were identified, or any proof made that the notes in question were ever delivered to the appellant by the alleged donor. The evidence in this case is not of that character to establish a gift as contended for by the appellant.

We have examined the other questions raised by appellant and we find no error in the ruling of the trial court. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

While it is true that the record discloses that some two or three witnesses testified that Elizabeth Swalm told them that she had made a gift or was going to make a gift to the appellant of some notes, no notes of any kind were identified, or any proof made that the notes in question were ever delivered to the appellant by the alleged donor. The evidence in this case is not of that character to establish a gift as contended for by the appellant. We have examined the other questions raised by the appellant and we find no error in the ruling of the trial court. The judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and thirty-_____

Clerk of the Appellate Court

Abstract
Opinion filed - 10/12/1933
PUBLISHED IN ABSTRACT

T. W. Doss, Appellee, v. Wm. P. Foran, Appellant.

Appeal from Piatt County Court.

OCTOBER TERM, A. D. 1933

273 I.A. 639²

Printing
Gen. No. 8783

Agenda No. 4

Mr. JUSTICE NEIHAUS delivered the opinion of the Court.

In this case, a judgment was entered by confession for the sum of \$568.12 in the County Court of Piatt County on the third day of March, 1933, in favor of the appellee, T. W. Doss, upon a promissory note and warrant of attorney which had been executed by the appellant, William P. Foran. The appellant thereafter appeared in court and made a motion to open the judgment; and to allow him to plead in defense on the merits. The appellee consented to have the motion allowed; and the judgment opened for that purpose; and it was ordered by the Court that the appellant be allowed to plead. The appellant filed a number of special pleas and the general issue, all of which were, however, finally withdrawn by him by leave of Court, except the fourth special plea, which he had pleaded; and to which the appellee had filed a general and special demurrer. The fourth special plea is as follows:

"And for a further plea in this behalf the defendant, William P. Foran, say that the plaintiff, T. W. Doss, ought not to have her aforesaid action against him, the said William P. Foran, because he says that the plaintiff's note mentioned in plaintiff's declaration was taken by the said T. W. Doss at the time of its inception and throughout the time of any dealings had by her, the said T. W. Doss, or any agent acting for her, was for money loaned upon noncompliance with the act regulating the loan business which is:

An Act to license and regulate the business of making loans in sums of three hundred dollars (\$300.) or less, secured or unsecured, at a greater rate of interest than seven (7) per centum per annum, prescribing the rate of interest and charge therefor and penalties for the violation thereof, and regulating the assignment of wages or salaries earned or to be earned, when given as security for any such loan. (Approved June 14, 1917, L. 1917, p. 553.)

And that the said defendant borrowed from the said T. W. Doss the sum of Two Hundred Eighty Dollars (\$280.00) and only the sum of Two Hundred Eighty Dollars (\$280.00) and that Two Hundred Eighty Dollars (\$280.00) was the total sum of money that the said defendant, William P. Foran, received from the said T. W. Doss; and that on or about September 1, A. D. 1932, he signed the above and foregoing note in said declaration mentioned for the sum of Four Hundred Seventy-seven Dollars and Thirteen Cents (\$477.13), and that the said note was given in a transaction wherein the total loan made by the said plaintiff to the said defendant was the sum of Two Hundred Eighty Dollars, and that the plaintiff was then without a license from the Department of Trade and Commerce as provided by the act of June 1917 as hereinabove set forth; and under the provisions of that act the said note and the chattel mortgage given to secure the same was and is void and that the plaintiff has forfeited the right to receive either principal or interest thereon: And this the defendant is ready to verify; wherefore he prays judgment if the plaintiff ought to have her aforesaid action against him, etc."

While these matters were pending, the appellee by leave of court, entered a remittitur which reduced the amount of the judgment which had been originally entered, to \$280.00. Upon a hearing of the demurrer to appellant's fourth special plea, the demurrer was sustained by the court; appellant stood by his plea and thereupon the Court entered the following order and judgment:

"This day come the parties to this cause, by their attorneys, respectively, and on motion of plaintiffs attorneys it is ordered that leave be and is hereby given said plaintiff to enter a remittitur on said original judgment of Five Hundred Sixty-eight and 12/100 Dollars (\$568.12) down to Two Hundred Eighty Dollars (\$280.00) as of the 3rd day of March, A. D. 1933 the date of the rendition of the judgment herein, which is hereby ordered and allowed, to which order and allowance thereof defendant, by his counsel then and there excepts.

And now said cause coming on to be heard upon the demurrer to the defendant's fourth plea filed in said cause, after arguments of counsel and due deliberation by the court, said demurrer is sustained. Whereupon the defendant elects to stand

by his fourth plea. Wherefore the plaintiff ought to have and recover of and from the defendant her damages sustained herein by reason of the premises, to which order defendant, by his counsel then and there excepts.

And now comes the defendant and enters herein his motion in arrest of judgment, which motion is by the Court overruled and denied, to which overruling and denying of said motion defendant by his counsel then and there excepts.

And now on motion of defendant's attorney it is ordered that leave be and is hereby given said defendant to withdraw all other pleas not stricken by order of the Court.

Therefore it is ordered by the Court that the judgment heretofore on the 3rd day of March, 1933, rendered herein in favor of T. W. Doss, plaintiff, and against the defendant for the sum of Five Hundred Sixty-eight and 12/100 Dollars (\$568.12) be and is hereby reduced to Two Hundred Eighty Dollars (\$280.00) in accordance with the remittitur entered by the plaintiff and said judgment for Two Hundred and Eighty Dollars (\$280.00) is ordered to stand in full force and legal effect as of the date of the rendition of said original judgment of Two Hundred Eighty Dollars (\$280.00) together with her costs, in this as well as in that behalf expended, to which order and judgment defendant by his counsel then and there excepts."

The legal sufficiency of the fourth special plea is the only question presented for review. The appellant contends, that the averments of the plea show a meritorious defense, namely, that the promissory note which is the basis of the judgment was taken by appellee in violation of the provisions of the so-called "Loan Shark" Act, which are as follows:

Section 1 of the Act provides "It shall be unlawful to make any loan of money, credit, goods or things in action in the amount or to the value of three hundred dollars (\$300.00) or less, whether secured or unsecured and charge, contract for, or receive a greater rate of interest than seven (7) per centum per annum therefor without first obtaining a license from the Department of Trade and Commerce as herein provided. * * * . "

Section 2 of the Act is as follows:

"Every licensee licensed hereunder may loan any sum of money, goods, or things in action, not exceeding in amount or value the sum of three hundred dollars (\$300.00), and may charge, con-

tract for and receive thereon interest at rate not to exceed three and one-half ($3\frac{1}{2}$) per centum per month." (Sect. 14, Chap. 74, Smith-Hurd Revised Statutes.)

We deem it sufficient to say in reference to this contention, that there are no facts stated in the plea, which show, that the transaction which resulted in the giving of the notes in question by the appellant, was under the Act referred to; but that there is an averment to the effect that the appellee was not a licensee under the Act. Nor are there any facts stated in the plea, which show that the transaction was a violation of the Act; nor in violation of any law of this State. The plea admits, that the appellant is indebted to the appellee in the sum of \$280.00, which he borrowed from the appellee. The judgment as reduced by the remittitur, is for the amount of this indebtedness. For the reasons stated, we are of opinion, that the Court did not err in sustaining the demurrer to appellant's plea; and in entering judgment for the amount stated. The judgment is therefore affirmed.

Affirmed.

(Four pages in original opinion.)

Louis J. Bremer, Administrator of the Estate of
Thomas K. Goff, Deceased, Appellee, v. V. P. Miller
and Southern Limited, Inc., a Corporation, Appellants.

Appeal from the Circuit Court of Vermilion County.

OCTOBER TERM, A. D. 1933.

273 I.A. 639³

Gen. No. 3792

Agenda No. 9

MR. JUSTICE DAVIS delivered the opinion of the court.

Appellee, Louis J. Bremer, administrator of the estate of Thomas K. Goff, deceased, commenced this action in the Circuit Court of Vermilion County to recover damages sustained by the widow and next of kin of said Thomas J. Goff, deceased, by reason of his death, caused, as claimed by appellee, by the concurrent negligence of V. P. Miller and the Southern Limited, Inc., a Corporation, appellants.

The declaration consisted of five counts, in the first count of which it is averred, in substance, that:

On August 4, 1932, in Edgar County, Illinois, Thomas K. Goff, now deceased, on a paved highway the paved portion of which was sixteen feet in width and known as State Route No. 1, at, to-wit: two miles north of Chrisman, Illinois, at 7:15 o'clock p. m., on the easterly half and within two feet of the east edge of the paved part thereof, was engaged in and about the repair of a certain tire on the left back wheel of a certain truck, then standing there, to-wit: off of the east side of, and, to-wit: two inches on the east edge of said pavement; that then and there the defendant, the Southern Limited, Inc., a Corporation, was engaged in the business of carrying passengers for hire by means of buses from Nashville, Tennessee, to Chicago, Illinois; which buses so used were motor vehicles, designed and used for the carrying of more than seven persons and for the carrying of forty persons, commonly designated as motor vehicles of the Second Division by the "Motor Vehicle Law of Illinois;" that, in and about its business, said Southern Limited, Inc., a Corporation, did propel said buses over said State Route No. 1, from Danville to Chrisman, Illinois, and from thence south, which buses were under the control and management of the servants of said defendant; and that while said Thomas K. Goff was then so engaged, as aforesaid, the defendant, the Southern Limited, Inc., a Corporation, by certain of its bus

drivers, propelled a certain of said buses aforesaid in a southerly direction toward, up to and past said part of said paved highway where the said Goff then was, as aforesaid, and while said bus was being propelled toward and up to that point of said highway where said Goff then and there was as aforesaid, the defendant, V. P. Miller, in a certain motor vehicle, designed and used for the carrying of not more than seven persons, designated as a motor vehicle of the First Division by the "Motor Vehicle Law of Illinois," which then and there was under the control and management of said defendant, V. P. Miller, who was propelling the same along said highway in a northerly direction toward, up to and past said part thereof where said Goff then was, as aforesaid; and that said automobile of the defendant, V. P. Miller, and said bus, so approaching each other from opposite directions, then and there were traveling in such manner and speed that said defendant, Miller, and said bus driver, each, then and there well knew, or would have known respectively, by the exercise of due care and caution on their respective parts, that at said point on said paved highway where said Goff then and there was, said bus traveling toward the south and said automobile approaching from the south would probably pass each other at said certain point where said Goff was as aforesaid.

And by virtue of said Statute law of the State of Illinois it became and was the duty of said defendant, the Southern Limited, Inc., a Corporation, by said bus driver in charge of said bus, while so approaching and reaching said point where said Goff was, to use and exercise reasonable care in the operation of said bus, that the speed thereof then and there be reasonable and safe, having regard to the traffic and the use of the way there; and by virtue of said statute it became and was the duty of the defendant, Miller, while so propelling his auto in a northerly direction, toward and up to said point on said highway where said Goff was as aforesaid, to use and exercise reasonable care in so managing, propelling and operating his said automobile, that the same then and there was not driven at a speed greater than was reasonable and proper, having regard to the traffic and use of the way there and not so as to endanger the life and limb of him, the said Goff.

Plaintiff further avers that then and there, in violation of the duty prescribed by said Statute law, the defendant, the Southern Limited, Inc., a Corporation, by its said bus driver, then and there carelessly and negligently did so propel, drive and operate said

certain bus last aforesaid in a southerly direction for a great distance, to-wit: one mile, upon and along said public highway toward and up to and past said point where said Goff so was, at the high and dangerous rate of speed of, to-wit: sixty miles per hour; and that then and there such operation of said bus at said rate of speed was an operation which was not reasonable and safe and which did not have regard to said traffic and said use of said way there; and plaintiff further avers that then and there, in violation of the duty prescribed by said Statute law, said V. P. Miller so traveling in a northerly direction toward and up to said Goff, so there as aforesaid, then and there carelessly and negligently did so propel, drive and operate his said certain automobile in a northerly direction for the distance of, to-wit: one-third mile, upon and along said public highway toward, up to and past said point there where said Goff so was as aforesaid, at a high and dangerous rate of speed of, to-wit: sixty miles per hour; that then and there such operation of said bus at said rate of speed aforesaid was an operation which was not reasonable and safe, and which did not have regard to said traffic and the use of said way there; and plaintiff further avers that then and there, in violation of the duty prescribed by said Statute law, said V. P. Miller so traveling in a northerly direction toward and up to said Goff, so there as aforesaid, then and there carelessly and negligently did so propel, drive and operate his said certain automobile in a northerly direction for the distance of, to-wit: one-third mile, upon and along said highway toward and up to and past said part thereof where said Goff so was, as aforesaid, at a high and dangerous rate of speed, to-wit: Sixty miles per hour; and that then and there such speed of said automobile so propelled by the defendant, Miller, was a rate of speed which was greater than was reasonable and proper having regard to said traffic and said use of said way there, and was such a rate of speed as to endanger the life and limb of said Goff; that, in consequence of said negligence, carelessness and violation of duties prescribed respectively upon the defendants, by virtue of said Statute law of Illinois, that the certain bus so traveling in such southerly direction and said certain automobile traveling in said northerly direction, each, at, to-wit: the same time, did reach said part of said highway where said Goff then and there was so engaged, as aforesaid; and in consequence of such negligence, carelessness and violation of the duties by defendant, then and there said automobile approaching from the south, with great force and violence did run upon, against,

strike and collide with him, the said Goff so there, and him, the said Goff, did hurl along said pavement, with great force and violence, for the great distance of, to-wit: fifty feet, and because of which striking of said Goff, he, the said Goff, became and was greatly bruised, mangled, wounded and injured, during all of which time he, the said Goff, and the wife and heirs at law of him, the said Goff, then, there, and at all times next prior theretofore were in the exercise of due care and caution for the safety of him, the said Goff; and in consequence of which said injury so occasioned and received by said Goff due to the negligence aforesaid of each of the defendants, he, the said Goff, thereafter, on, to-wit, the 5th day of August, 1932, in, to-wit: Paris, Illinois, did die.

The second count charges general negligence by each of the defendants in the management and operation of his and its respective motor vehicles, whereby said automobile, in passing between said bus and truck, struck and killed said Goff.

The inducement of the third count is practically the same as in the first count, and charges that it became and was the duty of the defendant, Miller, and of said bus driver, each, to give adequate, sufficient and proper signal and warning, by means of horn or like warning to said Goff, of such approach of said bus and of the automobile and the likelihood to pass each other there, and that the defendants negligently failed to give such warning and gave no warning, and that thereby said Goff was not warned of such impending danger and approach of said motor vehicles of the defendants; and that because of said negligence and lack of warning, while said bus and automobile were so, passing, said bus struck and killed said Goff.

The fourth count alleges violation of a common law duty of each defendant to Goff, in that each defendant did carelessly and negligently, respectively, drive an automobile and bus from opposite directions, toward each other, along said highway at a high and dangerous rate of speed, to-wit: of sixty miles per hour; whereby said bus and said automobile passed each other on said pavement there where said Goff was engaged on the east edge of said pavement in repairing the tire of his truck, and that said automobile there struck said Goff and injured him so severely that he died.

The fifth count is similar to the third count and charges that, due to the failure to give sufficient and adequate warning, Goff was not sufficient advised and warned of the approaching danger and was struck by said automobile which caused his death.

The defendant, Miller, demurred to the declarations, which demurrer was overruled; and, thereupon, he filed a plea of general issue and also a plea denying that he owned, possessed, operated or controlled the motor vehicle or automobile, mentioned by plaintiff in his declaration as being owned, possessed, operated and controlled by said defendant.

Replications were filed, and upon the trial of said cause the jury returned a verdict and assessed the damages of the plaintiff at the sum of \$7,500.00. Each of the defendant entered separate motions for a new trial. Motions were overruled, and judgment was given for the plaintiff against said defendants; and said defendants, thereupon, jointly and severally, excepted and prayed an appeal from said judgment to the Appellate Court of the Third District.

The evidence in this case discloses that the accident in question occurred on Route Number 1, in Edgar County, about three and one-half or four miles south of Ridge Farm, Illinois, between 7:15 and 7:30 o'clock p. m., on August 4, 1932. Thomas K. Goff was driving north toward his home, which was in Danville, Illinois, in an automobile which he had converted into a truck. With him were his wife and four children, ranging in ages from eight months to eight years, and also a Mrs. Gordon and her daughter, twelve years old. When he had reached the point on the highway, about two miles north of Chrisman, the tire on the rear left wheel of his truck blew out, and he drove his truck partly off of the pavement to the east with the two left wheels on the edge of the pavement and the balance of the truck standing on the shoulder. The shoulder sloped to the east and was eight feet wide, three and one-half feet of which was gravel and the rest dirt; east of this shoulder was a ditch about three and a half feet deep and about six feet wide at the top. The evidence tends to show that from the pavement to the edge of the ditch there was more or less of a decline, and that the deceased could not get his truck completely off of the pavement without being in danger of going into the ditch or having his truck tip over. From the point where the truck was parked the pavement extended upward on a slight incline for about one hundred yards and also extended on an eight or ten foot incline upward to the south a like distance. After he had stopped his truck he got out his tools and raised the rear left wheel with a jack. His wife got out of the truck and spread a blanket on the shoulder to the west of the car and placed three of the children on this blanket. Mrs. Gordon and her child and one of the children of the deceased went to a

farm house, about 600 feet south, to borrow a patch with which to fix the tire. The lugs on the wheel prevented the removal of the tire, and the deceased was sitting down on the pavement or stooping down with his face to the east trying to get them off. A large passenger bus, operated by the Southern Limited, Inc., was coming from the north and about the same time a touring car, driven by V. P. Miller, the other defendant, approached from the south. This bus and touring car passed each other at the point where the truck was standing; and the touring car, in passing between the truck and the bus, struck the deceased and inflicted the injuries from which he died.

Appellants each filed separate briefs. The appellant, Miller, did not testify on the trial. It is now charged by him that the deceased was guilty of contributory negligence in having parked his car partly on the cement pavement, instead of on the shoulder, and in not having the lamps on his car lighted. Neither of these contentions are tenable. The evidence shows that the truck was in plain view and could easily have been seen for over an eighth of a mile. This accident happened within twenty minutes after sunset on the evening of August 4th, when it is apparent that objects are plainly visible at such time in the summer for a long ways. There is no evidence in the record that it was dark or cloudy, and while the lights on the Miller car and the bus were burning, yet the evidence also shows that the truck could be seen for a long distance from either direction without any lights thereon.

Under the Statute law of this state motor vehicles must have their lamps lighted during the period from one hour after sunset to sunrise. The law imposed no duty upon the deceased to have his lamps lighted on his truck at that time. Although the statute of this state provides that persons driving motor vehicles upon state highways shall not park their cars on the concrete pavement, yet the courts have held that this provision does not apply when an emergency beyond control of the driver of the car occurs which compels the stopping thereof on the pavement, and it is of common knowledge that such emergencies frequently happen. *James v. Motor Transit Management Co.*, 260 Ill. App. 246, and cases cited.

As soon as Miller passed over the crest of the incline on his way north the truck and the deceased were in plain view. He was driving on the same side of the pavement on which the truck was parked. Mrs. Goff was standing near the rear end of the truck and the children were sitting on the blanket on the shoul-

der, near the rear end of the truck. He could also have seen the bus approaching from the north, and instead of stopping or slowing up the speed of his car and letting the bus go by, he proceeded at a speed of between 40 and 50 miles per hour and cut in between the truck and the bus and, in some way, escaped hitting either when he had but a few inches to spare, but in so doing struck the deceased and threw him 20 feet ahead of the truck and inflicted the injuries from which he died. There can be no possible excuse for such recklessness. The appellant, Miller, also assigned as error the giving and refusal of certain instructions, the admission and exclusion of evidence and improper arguments of counsel for appellee, all of which will be considered hereafter.

The appellant, Southern Limited, Inc., says it was guilty of no negligence as its bus proceeded at all times on the right side of the pavement, and west of the center line thereof, as it lawfully might do, and did not hit the deceased; and also that the deceased was guilty of contributory negligence in parking his car partly on the pavement, in not having the lamps on his car lighted, in failing to watch for approaching cars, and in placing himself in a dangerous position, and also errors in the giving and refusal of instructions and the admission and exclusion of evidence.

The evidence clearly shows that the truck was visible to the driver of the bus from the time it reached the crest of the decline. He claims, however, that he did not see the deceased sitting or squatting down close to the rear left wheel of the truck. Whether he could have seen the deceased by the exercise of ordinary care was a question of fact for the jury to determine from the evidence. There were over twenty persons in the bus, including the passengers; among these were John M. Fitzgerald, auditor of the Southern Limited, Inc., who, with his brothers, own a large part of the stock of such corporation, and had authority to supervise the driving of the bus in any way at any time. He testified, in substance, that he was sitting on the aisle seat just behind the driver, whose name was Beaman, and as the bus came over the knoll north of the parked truck the light of the Miller car showed the truck up; it was on the right side of the slab, and the hind wheel was about a foot and a half on the slab; that he saw Goff standing or squatting by the truck with his right side toward the hind wheel, facing northeast; that he saw Miller's car strike Goff between the hip and shoulders on his left side, and, as the car came along, it turned the man around and threw him beside the front wheel of the truck. He asked the driver to stop.

He said, "What for." He told him there had been a man hit with a car. The bus was south of the truck and the crossroad, when he said that to him. The bus went some distance before the driver stopped it; from where he sat he plainly saw to the left and out of the window; did not think the driver knew there was an accident until he called his attention to it; the right front hub cap of the Miller car hit the man; saw the Miller car before the accident, coming off of the knoll to the south, and watched it coming, and, in his opinion, it was traveling about forty miles per hour; that he did not warn the driver.

Marian Roy, a passenger in the bus and a witness for appellee, testified that she saw the truck when the bus was two blocks away from it and saw another car coming from the north. Mrs. Lulu Jones, another passenger and a witness for appellants, testified, in substance, that she was sitting in the bus directly behind the driver and was looking down the road, before the accident happened, and saw the truck and a man standing or sitting on the pavement at the side of the car. Mrs. Vernice Bird, also a passenger and a witness for appellants, testified that she was sitting in the front seat on the left hand side of the bus, near the aisle, and was gazing down the road and saw a truck parked on the left hand side of the pavement and there was a form stooping over the left wheel, presumably fixing a tire, but could not tell whether it was a man or a woman; that her best judgment is that the truck was a foot on the slab.

Apparently every person who was looking and had an opportunity to see saw the deceased at the rear left wheel of the truck before the accident, except the driver of the bus who had the best opportunity to see and whose duty it was to observe all objects in front of him. The jury was justified in finding either that the driver of the bus did see or by the exercise of reasonable care could have seen the deceased.

As to the speed of the bus, when it passed the truck of deceased, there is more or less diversity of opinion from the testimony of the witnesses. Mrs. Goff testified that it was traveling about 55 or 60 miles per hour. Alan Gideon was driving his automobile south on this highway, and when about a quarter of a mile north of where the accident occurred the bus, which was traveling the same way, passed him, and, judging from the speed his own car was coming, the bus was going between 50 and 55 miles per hour. When the accident happened the bus had gained on him 200 yards, or 600 feet. Marian Roy further stated it was going 45 miles per hour as it approached the truck. Mitchell

Woods, a witness produced by appellants and a passenger on the bus, stated that he had driven automobiles and ridden in buses and on trains and, in his opinion, the bus was going between 45 and 50 miles per hour as it proceeded toward the place of the accident. On the other hand, Mrs. Jones, a witness for appellants, said that the bus was not going fast, could not tell how fast, but that it slowed up when the driver saw the truck. How she knew when the driver saw the truck was not developed from the testimony. On cross-examination she testified: "The bus driver slowed up, and we all got out of the bus after the man was hit." Clay B. Beaman, the driver of the bus, stated that when the bus reached the top of the rise it was going 40 miles per hour, and when he saw the truck he slowed down, and when the bus passed the truck it was traveling 20 miles per hour. Mr. Fitzgerald, the auditor of the bus company, testified that when the bus came to the top of the rise in the road it was going about 40 miles per hour; and when it passed the truck it was going 25 miles per hour. He further stated that the rules of the company required that the bus should have slowed up to 25 miles per hour, when it passed the standing truck.

While it is true that the bus did not strike the deceased, yet if the manner in which it was driven, taking into consideration the circumstances existing at the time, to-wit: the truck parked partly on the pavement, the deceased working at the rear left wheel, the wife and children in view, as well as the car of the defendant, Miller, approaching from the south with the possibility of meeting it at the point where the truck was parked, created a situation which through want of care contributed to the death of the deceased, then the Southern Limited, Inc., is liable as joint tort-feasor.

Beaman, the driver of the bus, testified it was equipped with such braking power that, traveling at the rate of 45 miles per hour on a dry pavement with a load that it then carried, could have been stopped within 75 feet. As before stated, the jury were warranted in finding from the evidence that the driver, using ordinary and reasonable care, could have discovered the deceased working on his tire at the rear of his car on the pavement as he was directly in front of him; he also saw Miller's car approaching from the south, and testified that it had been in his view for half a mile. Common prudence would have suggested that he should slow down the speed of the bus so that it could be instantly controlled, if necessary. It was for the jury to determine from all of the facts in evidence whether the operation of the bus at the time and

place in question, in the manner in which it was so operated, constituted negligence under the circumstances.

The Supreme Court of Maine, in deciding a somewhat similar case, held:

That whenever an automobile appears to be stationary upon the road or roadside, the standard of due care on the part of an operator in approaching a car thus standing should be made commensurate with the danger involved. That it is wise to enunciate a rule that will save life rather than one that will jeopardize it, and that it should be held, in order to meet the proper standard of due care, in approaching a stationary car, that the operator of the moving car should be charged with the duty of observing whether any person or persons are connected with such car, and should have his car under such control, in passing such car, as to avoid an accident with any person or persons who may be about such car, as such car is liable to conceal some person or persons and may even hide little children from view, who may at any moment dart into the road. *Daugherty v. Tebbetts*, 120 Atl., 354.

In the case of *Morrison v. Flowers*, 308 Ill. 189, the Supreme Court of this State held: That if one is driving his automobile at a speed in excess of the statutory limit, or at an unreasonable or a dangerous speed, he can not escape liability because the child who is injured ran in front of the automobile so suddenly that the accident was then unavoidable. It is also held in this case:

"It is a question of facts for the jury to determine, in view of all the surrounding circumstances, whether the failure to look constitutes lack of due care. In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his negligence."

In the case of *Johnson v. Coey*, 237 Ill. 88, it was said:

"The driver of the automobile was bound to use at least ordinary and reasonable care. He was bound to anticipate that he might meet persons or vehicles, and to keep a proper outlook

for them and use care to have his machine under such control as to enable him to avoid the collision. It was for the jury to say what the rate of speed was; whether it was negligence to approach the street intersection at such rate; whether the driver slackened speed; whether there was a lack of ordinary care in approaching the car without slacking speed, and whether the brake-rod broke and caused the collision or the force of the collision broke the brake-rod."

The statute provides that motor vehicles of Division 2 in which the bus in question is classified, when traveling upon the highways, must not exceed a rate of speed of forty miles per hour. (Chap. 95a, Par. 24, Sec. 23 (2) and (5), and also that all motor vehicles at all times must be driven at a speed which is reasonable and proper, having regard to the use of the way, and so as not to endanger the life or property of any person. (Chap. 95a, Par. 23, Sec. 22.)

It was a question of fact for the jury to determine at what rate of speed the bus was driven toward and past the parked truck; whether such speed was reasonable, proper and safe, having regard to the use of the way and whether such speed constituted negligence, which, combined with the negligence of the defendant, Miller, was a proximate cause of the injury. It was not negligence *per se* for the deceased to park his car with the two left wheels upon the pavement; and whether it was in fact negligence to do so, under the circumstances shown, was a question of fact for the jury, *James v. Motor Transit Management Co.*, *supra*, and cases cited.

Appellant, Miller, assigned as error certain remarks made by counsel for appellee in his argument to the jury as being inflammatory and tending to arouse the passions of the jury. The record shows that the following transpired: "If the Court please, and you too, gentlemen of the jury, I am not here to abuse anybody. I don't know why Mrs. Goff, this little woman here, should be charged with such as she was by the insinuation in the last argument." Mr. Lindley: "Objection." I have not insinuated anything against Mrs. Goff. Will you let me make the objection? The court: "The jury will disregard any remarks made by counsel which are not fairly inferable from the arguments."

It is claimed that the above statement was made for the sole purpose of securing sympathy on the part of the jury and prejudice their minds against Miller. We do not believe the above statement by counsel, in his argument, could have had any serious influence

upon the minds of any fair-minded jurors. The other statement objected to appears as follows: "Trapped? Yes. Two jaws in an immense trap with teeth of Death." Yes, Mr. Lindley, it was a trap, and the poor bait between the jaws." Mr. Lindley: "Objection to the argument of counsel referring to the "poor bait" and ask that the jury be instructed to disregard that. It is to instigate sympathy." The court: "Sustained."

It is objected to by counsel that the above statement was an attempt to create prejudice. The court sustained the objection to this statement, and the criticism is that he should have instructed the jury to disregard it. While this is probably true, and it would have been better practice if the court had so instructed the jury, yet his failure so to do is not such error, under all of the facts and circumstances in evidence in the case, that should cause a reversal of the judgment. No objection has been urged in this regard by counsel for appellant, the Southern Limited, Inc.

The appellant, the Southern Limited, Inc., urges that the testimony of the witnesses in references as to whether it was light or dark when the accident happened, and as to how far they could see at that time, was erroneously admitted. These witnesses were not testifying as experts and giving their opinion as such, but were testifying to facts which existed at the time of the accident, and which testimony was competent. The same counsel objects to the refusal of the court to admit as evidence a plat of the highway in question, at and in the vicinity of the accident. The accident happened August 4, 1932. The witness who made the plat testified that he took the measurements therefor on February 14, 1933. On the plat numerous objects are named, such as telephone pole, stop sign, mail boxes, sign supports, fences, gravel shoulders, ditches, culverts, etc. No evidence was introduced to show that the same conditions existed at the time of the accident, and it was not error to refuse its admittance.

The first instruction, given on behalf of appellee, informs the jury that the mere act of leaving an automobile standing upon the proper side of a public highway cannot, as a matter of law, be regarded as negligence, and that it is a question of fact in each case for the jury to determine whether, under the given circumstances, surroundings and facts in a given case, a person is guilty of negligence, who may leave a motor vehicle standing upon the proper side of a public road. Counsel for the Southern Limited, Inc., criticized this instruction as being argumentative, and also that it violates the rule that the jury should judge what facts

constitute negligence, and the instruction should not attempt to take this matter from the jury. The instruction is not subject to either of these objections. It is not argumentative, and certainly does not usurp the function of the jury in determining the question of negligence as it specifically informs them that it is their duty to do so.

It is further claimed by the same counsel that appellee's instructions 2, 7 and 8 were erroneously given for the reason that they improperly seek to emphasize and impress upon the jury's mind that the court considered the fact of speed a very important question. Instruction 2 quotes the statute in regard to the speed of motor vehicles of the character of the motor bus. Instruction 7 has the additional clause that the operation of such motor vehicle shall always be reasonable and safe, having regard to the traffic and the use of the way. Instruction 8 states that no person shall drive a motor vehicle of the class to which Miller's automobile belonged upon a public highway at a speed greater than is reasonable and proper having regard to the traffic and the use of the way or so as to endanger the life or limb or injure the property of any person. The automobile driven by appellant, Miller, belonged to the First Division, as defined by the "Motor Vehicle Law" of the State, and the passenger bus driven by the appellant, the Southern Limited, Inc., belonged to the Second Division, as defined by the "Motor Vehicle Law." Appellee had a right to have the jury informed as to the restrictions provided by the law on the speed of motor vehicles of each division. Instruction 3 is criticized as being argumentative, and that it assumes certain facts to be the law. This is the only instruction that counsel for appellant, Miller, has objected to in their brief and argument, and their objection to it is the use of the word "mishap" and claims that it does not mean the same as the word "emergency," as used in the statute. This instruction informs the jury that if without fault of a person operating a motor vehicle on the public highway he is required to leave the same standing on the highway because of some mishap beyond his control, and not caused by the lack of due care on his part, would not be negligence as a matter of law, but the question as to whether the operator of such motor vehicle was negligent in leaving the same standing upon the highway is a question of fact for the jury to determine in the consideration of all the facts, circumstances and surroundings of a given case shown in the evidence. Taking into consideration all of the instructions given to the jury as a series, the jury could not have been misled by the use of the word

"mishap." Appellant, Miller, assigns as error the refusal of the court to give instructions 1, 3 and 4, offered by appellants. Appellant, the Southern Limited, Inc., assigns as error only the refusal to give said instruction 4. Refused instruction 1 informs the jury if they believe from the evidence, immediately prior thereto and at the time of the accident Goff had parked his truck on any part of the highway then, in order to warn other persons approaching from the rear, of the presence of said truck it was necessary that the rear light on said truck be lighted, and if they further believe from the evidence that the rear light of the truck was not lighted due to the negligence on the part of Goff, and that the failure to have said rear light so lighted contributed to the injury complained of then the plaintiff could not recover. There was no evidence which tended to show that a light on the rear end of the truck was necessary to inform any person, approaching the same from the rear, of its presence on the highway. Every witness in the case testified that the truck was plainly visible for a long distance without any light thereon, as we have heretofore shown. Refused instruction 3 was to the effect that if any instruction had been given by the court on the subject of plaintiff's damages, or that defendant's counsel may have discussed such subject, is not to be taken by the jury as any intimation by the court or as any admission by defendants of any liability. No instruction was given on the question of damages, and the court might have modified this instruction by making it apply only to the discussion of damages by counsel, but it was not required to do so. An instruction was given on behalf of appellant that if the jury found from the evidence that the plaintiff was not entitled to recover then they will have no occasion to consider at all the question of damages. The refusal to give instruction 3 was not reversible error. Refused instruction 4 is to the effect that if Goff had allowed his truck to stand on the highway in such a position that there was not ample room for two vehicles to pass upon the road, and that he was guilty of negligence in so parking his truck, the appellee could not recover and they should find the defendants not guilty. The instruction omits all reference to the fact that Goff might have been compelled to so park his truck by reason of an emergency; moreover, the evidence shows that there was sufficient room for two vehicles to pass the truck because they actually did so without colliding with each other. The instruction directed a verdict, and there was no error in refusing it. Moreover, Miller did not testify, and made no claim that he did

not see the truck; but on the contrary, several witnesses testified that he told them, respectively, that he did see the truck but did not see the man.

It is urged that the amount of the judgment is excessive. The deceased left a widow and four young, minor children, dependent upon him for their support. He was a painter by trade and also sold coal. We are not inclined to overrule the judgment of the jury as to the amount of damages.

In our opinion there is no reversible error in the record, and the judgment of the circuit court is, therefore, affirmed.

Judgment affirmed.

(Eighteen pages in original opinion.)

Writ of Error to the Circuit Court of Shelby County.

273 I.A. 6394

Agenda No. 12

Plaintiff in error was indicted and convicted of embezzlement under Par. 190, Sec. 78, Chap. 38 (Cahill's Rev. St. 1931), which provides:

“If any warehouseman, storage, forwarding or commission merchant, or other person selling on commission, or his agent, clerk or servant, shall convert to his own use, grain, flour, beef, pork or other property, or the proceeds or avails thereof, without the consent of the owner thereof, or shall fail to pay over the avails or proceeds thereof, less his proper charge, on demand by the person entitled to receive the same, or his duly authorized agent, he shall be fined not exceeding \$1,000.00 or confined in the county jail not exceeding one year, or both, and shall be liable to the person injured in double the value of the property or amount of the money so converted.”

He was sentenced to confinement in the Illinois State Farm at Vandalia for 120 days and to pay a fine of \$200.00 and costs, and, if the fine and costs was not paid at the expiration of 120 days, it was provided that he work the same out at the rate of \$1.50 per day at said State Farm.

The grand jury returned an indictment consisting of five counts in which the plaintiff in error and his son, Cyril Wilson, were named as defendants, the son, Cyril Wilson, being found not guilty by the jury.

The first count charges that said defendants were persons selling on commission fruits and vegetables; that they obtained from one Otis Slater his fruit, to-wit, 79 bushel baskets of peaches, belonging to said Otis Slater, and that they undertook to sell on commission said peaches and promised to account for the proceeds of the sale thereof to said Otis Slater, and that they unlawfully and wilfully converted said peaches to their own use without the consent of said Slater, and without accounting to him for the proceeds thereof or said peaches, they being of the value of \$59.25.

The second count is in the same language as the first, except that the value of the peaches is alleged to be \$47.40.

The third count charges that they were persons selling fruits and vegetables on commission and that they obtained from one Otis Slater 79 bushel baskets of peaches belonging to said Otis Slater and that they undertook to sell said peaches on commission and promised to account to Slater for the proceeds thereof and that they unlawfully and willfully converted said fruit to their own use without the consent of said Otis Slater and failed to pay over the avails or proceeds thereof to said Otis Slater and his duly authorized agent having then and there made demand upon said defendants for the proceeds thereof, said peaches being of the value of \$47.40.

The fourth count, after the preliminary averments, charges that defendants promised said Slater to account for the proceeds of the sale of said peaches and unlawfully and willfully failed and refused to pay over the avails or proceeds thereof, less their proper charges, on demand by said Slater and his duly authorized agent, said peaches being of the value of \$47.40.

The fifth count is like the fourth count except that instead of charging that the value of the peaches was \$47.40 it is alleged that the proceeds of the sale of said peaches was of the value of \$47.40.

The prosecuting witness, Otis Slater, lives at Oconee, Shelby County, and owns a peach orchard. He testified that on August 24, 1931, plaintiff in error and his son, Cyril, came to his orchard and:

“They were wanting peaches to sell; were opening up a little commission house in Pana. The old gentleman did most of the talking. They wanted a job of peddling peaches or selling on commission. I told them they could have peaches on the same condition other people were selling for me.”

One of the controlling issues in this case was whether there was an absolute sale of the peaches or whether they were delivered to plaintiff in error to be sold by him on a commission basis. The above testimony consists of pure conclusions of the witness and should have been objected to and excluded, and undoubtedly, if objections had been made thereto, it would not have been admitted.

However, the above testimony was highly prejudicial to plaintiff in error, as it permitted the prosecuting witness to testify to his conclusions upon an ultimate fact material to the issue and was of such a nature that the court could have of its own motion refused its admission. *People v. Winchester*, 352 Ill. 237.

The witness further testified, in substance:

"I was selling peaches at 75 cents a bushel; told them I would furnish peaches to them at 60 cents; told them they could bring the peaches back that they did not sell; they got a few peaches on that day. I instructed my daughter to keep the books of the transaction; I told her to handle it for them; both of them were there then; they got the peaches and drove away; next morning they paid for the peaches they got the day before, and got more peaches; he drove off, and I did not see him any more that day; I saw him at his place of business a couple or three days later, on Second street, in Pana. I was there at that place three or four days after the last day they were at the orchard. I saw them both; had a conversation with Alva Wilson. I told him I had come for my money. He said the boy was his bookkeeper and paymaster; he would be through in a minute; he was talking to a gentleman in the rear of the building. I waited till he talked to him, and the boy went out the back door, got in a car and drove off, and I wasn't able to catch him any more. He only said the boy had the money and that he (plaintiff in error) could not pay me; nothing else was said; I waited a week and got Mr. Preihs, an attorney, to make demand for the money. I received money along for the peaches, but not for the last bunch. I am not sure whether the first was in full or not. Did not receive the money for the peaches sold the second or third day. I told him the peaches must be paid for at the orchard each morning, the peaches that was got the day before, with the privilege of returning all baskets unsold or that became soft. He was to give 7½ cents for baskets not returned; when he returned them I gave him credit for same amount; if the basket was brought back the credit was given the same as the charge that was made for the basket; I told him, when I went to his store in Pana, I wanted my money. He said the boy had the books and money and he would be through in a minute. The boy went out the back door and got in a car and I did not talk to him; I did not see the boy any more. I never made demand on the boy for the money. I told the father I had come the last time; I did not go back any more; that is the only demand I ever made on the father. He never refused to pay. He said the boy had the money and he would pay me in a few minutes, and I never did see the boy after that."

He admitted that plaintiff in error by his attorney offered to pay him \$28.00.

This testimony of the prosecuting witness, standing alone, and excluding the incompetent part, comes far from proving beyond a reasonable doubt that the peaches in question were delivered to the plaintiff in error to be sold by him under a commission contract. A reasonable construction of this contract would be that the peaches were to be delivered to the plaintiff in error each day on his promise to pay for the peaches received by him the previous day. There was no agreement between the parties as to the price at which plaintiff in error should sell the peaches nor as to the amount of any commission that he was to receive for selling them. Mrs. Green, a daughter of the prosecuting witness, who was present when this conversation was had between her father and the defendant in error testified:

"They could sell them for a dollar a bushel if they could get it."

Gertrude Green further testified, in substance, that she was present when plaintiff in error and his son, Cyril, came to the orchard on August 24, 1931; that she heard her father say, "I will let you have some on commission like other people are getting them from us;" that Cyril said to me that he would see that they were paid for, because I stood at the truck door and talked to him about paying for them; there was a lot said, and they would settle every day; she kept the books for her father, and that Exhibit A is a just account of our dealings with the Wilsons. It is a book I kept of the transactions at the orchard with them and is true and correct. I wrote the items on page 1 of Exhibit A and wrote the words: "Produce furnished to sell on commission to be settled for as sold." I did not write it before I wrote August 24, if I had written it before I would have gotten upon the line. They got the last peaches on Wednesday, August 26, and I saw Wilsons on Friday afterwards. I went to their office in Pana, and there was no one in when I went except Alva Wilson. I asked him for baskets; we needed them. He said he could not let me have baskets today. He had them full of peaches. I asked him for the money, and he said Cyril kept the books and when he came back he would see if our books were correct. He said he could not pay me all. He would at least see if our books were together. Cyril was not there but I saw him afterwards and he said he could not settle right now, he had to go, he would be right back. I had no further conversation with Cyril that day. I wrote on page one of Exhibit A the words: "Produce furnished to sell on commission to be settled for as sold," because my father told me to write that in. It was written after the Wilsons got the number

of bushels. My father said to put it in, he did not trust them and I put it in. Some of the other pages I fixed the amount as Dad told me to.

Exhibit A, marked for identification People's Exhibit 1 and 1a, is a page of an account book, which the witness testified she had kept, and on which was written the words above quoted. The exhibit was admitted in evidence without any objection on the part of plaintiff in error, so far as the record discloses. It was incompetent for the purpose of showing what the contract was.

Books of account are not competent to prove the terms of a parole contract by an entry therein setting forth the agreement. Enc. of Evidence, Vol. 2, p. 658, b, and cases cited in note 21; 22 C. J., p. 498, Sec. 1093, and note 82; *Lyman v. Bechtel*, 55 Ia., 437; *Griesheimer v. Tenenbaum*, 124 N. Y., 650; *Jacobs v. Morgenthaler*, 149 Mich. 1; *Deatherage v. Petruschke*, 106 Minn. 20; the admission of this Exhibit A should have been objected to.

The evidence discloses the fact that these words were written on the page of this account by the witness, at the direction of her father, without the knowledge or consent of the plaintiff in error or his son and after one or more of the items had been entered thereon. It was a self-serving declaration and incompetent as proof of what the contract was. The fact that this witness and her father designated it as a commission contract is immaterial. They could not make it such by giving it that name, if the facts proved otherwise.

Both plaintiff in error and his son positively deny that they ever promised to sell peaches on commission, and testify that the word "commission" was never mentioned in their conversations with the prosecuting witness or with his daughter.

Mrs. Fay Hill, another witness, who was working in the orchard when plaintiff in error came there for the first time, testified that she heard the conversation between Otis Slater and plaintiff in error and that, in substance, Slater told him that he could not sell the peaches to him, but that he would let them have them as he was letting others have them, sell them and pay them each day for the peaches he got and sold.

This witness does not testify that anything was said between the parties about selling the peaches on a commission basis, nor does the prosecuting witness, Slater himself, testify directly that the plaintiff in error was to sell the peaches on a commission basis for him. His only testimony on this subject was the incompetent testimony: "They wanted a job of peddling peaches or selling on commission."

The son of plaintiff in error testified that he also kept an account of the peaches bought and sold by his father, which shows that the amount of the indebtedness of his father to Slater was \$29.80, and it is admitted by Slater that plaintiff in error, through his attorney, tendered him the sum of \$28.00 in payment of the debt, which Slater refused to accept; so that the amount in controversy between them was less than \$20.00, as the total amount claimed by the prosecuting witness was \$47.47, as shown by People's Exhibit 1 and 1a.

From the record in this case it is apparent that defendant in error relied only for conviction upon the last three counts of the indictment because the only instruction given for a directory verdict is based upon those counts. This is the sixth instruction given on behalf of the defendant in error, and by which the jury is instructed that if they believe from the evidence beyond a reasonable doubt that the defendants were selling fruit and vegetables on commission and undertook to sell on commission the peaches of Slater and to account to Slater for the proceeds of the sale of said peaches less their proper charges therefor, and if they further believed that said defendants obtained from Slater the peaches described in the indictment for the purpose of selling on commission, and that the said defendants failed to pay over to said Slater the proceeds of the sale of said peaches less their proper charges, upon demand by Slater, then the jury should find the defendants guilty.

It was imperative for a conviction under the last three counts of the indictment that such a demand as is contemplated by the statute should have been proven by the evidence beyond a reasonable doubt as the only issue submitted to the jury were those that were embraced in these counts.

In the case of *Wright v. People*, 61 Ill. 383, the court said:

"This statute being penal in its nature must receive a strict construction. An actual demand, to be made by the consignor upon the commission merchant, is an indispensable prerequisite to a conviction.

The complaining witness testified that, when he went into the place of the accused, in Chicago, the latter said: 'I know what you have come for, but it is impossible for me to pay you anything now.' The witness stated that the accused knew well enough what he had come for, and this was all the demand he claimed to have been made.

In a civil cause, where a demand was necessary, such evidence might be sufficient for a jury to find a waiver.

But the statute under consideration requires both a wrongful conversion of the proceeds and a failure to deliver them over after a demand made by the consignor, to constitute the offense.

The demand should be made in such a manner as to fairly apprise the merchant that he would be subject to the penalties of the statute if he failed to comply, else he might, by the very course of dealing assented to by the consignor, be entrapped into the consequences of a criminal offense unawares, and without any wrong intention. Such a result would be repugnant to the spirit of our criminal code, and, as we believe, to the intention of the statute in question."

We have heretofore mentioned all the evidence introduced with reference to a demand. Slater testified that he requested an attorney to make a demand for the money of the defendants, but the attorney did not testify and there is no evidence that he ever made such demand.

There was no demand made, in such a manner as to fairly apprise plaintiff in error that he would be subject to the penalties of the statute if he failed to make payment. In fact the plaintiff in error did not consider that such a demand had been made upon him, as shown by the fact that he offered to compare his account with that of the prosecuting witness, which the latter declined to do, and plaintiff in error thereafter offered him \$28.00 in settlement of the account. The demand contemplated by the statute is one of the material elements which cannot even be waived, but must be proven beyond a reasonable doubt in order to sustain a conviction under the indictment in this case.

In *Haines v. People*, 97 Ill. 161, the court said:

"It may be urged that having waived the demand, the administrator is just as culpable for failing to pay over the money as if the demand had been made. That may be so in morals, but courts do not sit to enforce mere moral rules, except where they constitute a part of the positive law of the State. But the conclusive answer to this is, that the offense consists in failing to pay over after demand made, and not after demand waived, and there is no power outside of the legislature to substitute one for the other."

After a careful consideration of all the facts in evidence in this case we are of opinion that the evidence with all the intendments which can be legally deduced therefrom does not prove that plaintiff in error was guilty of the offense charged in the indictment.

The judgment of the circuit court is reversed and the cause remanded.

Reversed and Remanded.

(Nine pages in original opinion.)

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Open on 10-12-1933

PUBLISHED IN ABSTRACT

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(West) from
James D. Webster, Appellee, v. James E. Lefferdink,
doing business as **Lefferdink Construction**
Company, Appellant.

Appeal from Circuit Court of Sangamon County.

OCTOBER TERM, A. D. 1933.

273 I.A. 840

Gen. No. 8799

Agenda No. 15

MR. JUSTICE DAVIS delivered the opinion of the court.

Appellee recovered a judgment in the circuit court of Sangamon County in an action on the case against appellant in the sum of \$5,229.00 for personal injuries received in an automobile accident.

The declaration consists of four counts, all of which are substantially the same. It is alleged that on the second day of October, 1930, Missouri State Highway No. 6 was under construction and runs in an easterly and westerly direction in Knox County, Missouri, and that a large number of people and vehicles were constantly passing over and along said highway; that on said date appellee was driving a truck in a westerly direction there-over, near the town of Hurdland, and that appellant through its servants was then and there driving a certain caterpillar tractor with a road grader attached thereto in an easterly direction along said highway, and that it was the duty of appellant to operate said tractor and grader in a reasonable, careful, cautious manner, having due regard for the traffic and use of the way, but appellant so negligently and carelessly drove and operated said tractor and grader that appellee was caused and forced to drive said truck, then being driven by him in the exercise of due care and caution for his own safety, into and against said tractor with great force and violence and, as a consequence thereof, he received severe and permanent injuries. All the counts charge general negligence on the part of appellant except the third, in which it is alleged that appellant negligently drove the tractor and grader without warning directly in front of the truck driven by appellee whereby the truck collided with the tractor.

The only errors presented by appellant for review in this court are, (1) the trial court erred in refusing to direct a verdict at the close of all the evidence, and (2) the verdict is against the manifest weight of the evidence.

The evidence shows that the highway at the point in question where the accident happened was under construction by being graded and surfaced with gravel by the Shelby Construction Company, the employer of appellee; that the construction had commenced about two miles west of Hurdland and gravel was being spread as the grading proceeded east from that point toward Hurdland; that appellant had, prior to the accident, constructed the grade on the road and on the day of the accident was leveling off the bumps in the roadbed so as to put it in condition to receive the gravel. The Shelby Construction Company was at the same time hauling gravel and dumping it on the parts of the road which had been prepared to receive it. The accident happened in the center of a fill that ran east and west and which was between eight to ten feet high, and the road at this point being thirty to thirty-two feet wide. Appellee was engaged in hauling gravel for the Shelby Construction Company. The gravel was hauled from Hurdland west over the highway to the point where it was dumped for spreading, and there were twelve or fifteen other men driving trucks and similarly employed by this company. The road inclines downward from each end of the fill. While this construction was going on, the road was open for public travel, but signs were erected along the road stating: "Road under construction; travel at your own risk."

On the morning of the accident appellee had loaded his truck with two yards of gravel and started for the west end of the improvement, where the gravel was at that time being spread, and was proceeding at a speed of between ten and fifteen miles per hour. When he approached this fill he saw the tractor with the grader attached, and operated by a servant of appellant, going east on the south side of the road, and when he got within thirty-five or fifty feet of the tractor it swerved to the left or north side of the road and appellee's truck ran into it. Appellee testified that just before the collision his truck, loaded with gravel, was progressing down grade and he was unable to stop the truck within this distance of thirty-five or fifty feet which he was, at that time, from the tractor although he applied his brakes and was going but ten to fifteen miles per hour.

The driver of appellant's tractor was engaged in leveling off the bumps along the roadway, and his method of doing this was to proceed on one side of the road in one direction and then turn and go in the opposite direction on the other side of the road.

Appellant insists that, at the time the tractor was making the turn, it was not traveling at a greater speed than two miles per hour; that the evidence discloses that it was in low gear, and that in low gear the tractor traveled at 1.9 miles per hour, yet the evidence further discloses that while appellee proceeded west on the north side of this highway, which was thirty feet in width at that point, traveling at as low a rate of speed as from ten to fifteen miles per hour and while proceeding a distance of thirty-five to fifty feet the tractor, which was thirteen feet long, had turned from the south side of the road far enough towards the north so that the truck of appellee struck the tractor in front of the right hand rear sprocket.

The driver of the tractor, when about to turn the same, saw one car passing from behind, and, without looking to see whether a car might be coming from the other direction, turned the tractor in front of appellee's truck. There is practically no conflict in the evidence which presents purely a question of fact for the jury to determine, whether under the circumstances the driver of appellant's tractor was guilty of negligence and whether appellee was guilty of contributory negligence in not having his car under such control that he could stop it before striking the tractor. The jury saw the witnesses and heard them testify, and their verdict has been approved by the trial court, and we do not feel justified in setting it aside. The judgment of the circuit court is affirmed.

Judgment affirmed.

(Four pages in original opinion)

Abstract.
Opinion filed January 12, 1934

PUBLISHED IN ABSTRACT

54 H

Edward L. Jones, Appellee, v. Philip George,
Appellant.

Appeal from Circuit Court of Hancock County.

OCTOBER TERM, A. D. 1933.

273 I.A. 640

Gen. No. 8811

Agenda No. 21

MR. JUSTICE DAVIS delivered the opinion of the court.

Appellee brought this suit in a Justice of the Peace court to recover damages alleged by him to have been sustained to his automobile in a collision with a car owned by appellant, and from a judgment in his favor appellant prayed an appeal to the Circuit Court of Hancock County, where on a trial of said cause appellee recovered a judgment for the sum of \$124.80 from which judgment this appeal was perfected by appellant.

Two alleged errors are relied upon by appellant for a reversal of the judgment, to-wit: contributory negligence on the part of Virgil Jones, a son of appellee, who was driving the automobile at the time of the accident and in the giving and refusing of instructions.

No evidence was offered by appellant on the trial, but at the close of the evidence for appellee and again, after appellant waived his right to offer evidence, motions were made to direct a verdict for appellant on the ground that the evidence proved contributory negligence on the part of the driver of appellee's automobile, which motions were overruled.

The facts disclose that about seven o'clock in the evening of May 18, 1932, appellee's son left the home of his father about four miles north of the village of Fountain Green, in his father's automobile, and drove along the highway in a southerly direction toward that village. It was getting dusk but was not dark and an automobile could be seen at a distance of about one mile. The lights on the car were not lit, and from the evidence it is evident that none were necessary.

At a distance of about a mile from Fountain Green the highway curved to the south in a long curve of between thirty-five and forty degrees, and cars could be seen approaching the curve from either direction. At the turn the east side of the road is from six inches to a foot higher than the west side. The traveled portion of the road is thirty feet wide and a part of it has been oiled. The oiled portion around the curve, which was from nine to twelve feet in width, was closer

to the west side of the road and appellee's son drove on the right or west side of the road as he entered the curve at a speed of between thirty-five or forty miles per hour. When he was about a half block from the turn he saw appellant's automobile, coming towards him, from the opposite direction and about the same distance from the turn and at about the same rate of speed.

On the west side of the road, as you approach the turn going in a southerly direction, there is a grader ditch and a bank on the west side of the ditch two or three feet high, but at the turn there is no ditch and the road runs right up against the bank. Appellee's son drove his automobile within a foot of the edge of the ditch and bank and could not with safety have driven any closer to the ditch or bank. Appellant, however, failed to turn to the right off of the oiled portion of the road in passing appellee's automobile, the evidence showing that the left wheels of his car were not more than four feet from the bank at the curve, and consequently a collision occurred which damaged appellee's automobile.

This evidence is undisputed but appellant contends that appellee's son should have anticipated that appellant might drive on the left hand side of the road on the oiled portion, as it was usually done by drivers, going north around the curve, and that the speed of appellee's car under the circumstances was excessive and constituted negligence. It is also claimed that the fact that appellee's son failed to have his lights turned on and failed to give any warning of his approach by sounding the horn were acts of negligence on his part.

While it is true that appellee's son had the right of way while driving south on the extreme right of the traveled portion of the road and may have presumed that the driver of the approaching car would travel a sufficient distance from the west side of the road in order to pass him in safety, yet, he had no right to rely solely upon such presumption as he would not thereby be relieved from exercising that degree of care and caution that a reasonably prudent person would exercise under like circumstances and surroundings. No one has a right to assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care. However, in determining whether the son of appellee was guilty of contributory negligence, such presumption is to be considered and accorded due weight. *Schlauder v. Chicago & So. Trac. Co.*, 253 Ill. 154.

Although appellee's son failed to have his lights turned on and failed to give any warning of his approach by sounding the horn, neither did appellant have lights burning on his automobile or sound his horn, and for the obvious reason that no lights or other signals were necessary as both cars were in plain view of each other as they approached the turn of the curve and appellee's son was to the extreme right of the traveled portion of the road. Nor was thirty-five or forty miles per hour, the speed at which appellee's car was driven around the curve in question, evidence of negligence on the part of appellee's son under the circumstances.

From a consideration of all the admitted facts and circumstances it is evident that the defense of contributory negligence is without merit.

Several technical objections are made to some of the instructions given for appellee. Sixteen instructions were given by the court on behalf of appellant and covered every phase of his rights under the law.

The jury could not have been misled by any of the alleged errors in appellee's instructions and, as under the evidence the jury could not have rendered any other verdict, it is unnecessary to discuss them. *Pridmore v. The C. R. I. & P. Ry. Co.*, 275 Ill. 386, and cases cited.

The judgment of the circuit court is affirmed.

Judgment affirmed.

(Four pages in original opinion)

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PUBLISHED IN ABSTRACT

**William Henry Stahl, Administrator of the Estate of
Isaac N. Stahl, deceased, Appellee, v.
Walter Jones, Appellant.**

Appeal from Circuit Court of Champaign County.

OCTOBER TERM, A D. 1932.

273 I.A. 64

Gen. No. 836-8684

Agenda No. 36

MR. JUSTICE FULTON delivered the opinion of the court.

This was an action on the case to recover damages for negligently causing the death of Isaac N. Stahl, deceased. The case was tried before a jury which returned a verdict for the appellee in the sum of \$2,750.00. Appellant appeals from the judgment entered on the verdict.

The declaration consisted of two counts, the first charging appellant with negligent operation of his motor car while driving in a northerly direction over the intersection of Walnut, Neil and White Streets in the City of Champaign, and that through such negligence he struck Isaac N. Stahl, who died as a direct result of his injuries, leaving five adult sons and daughters, as his next of kin. The count further avers due care on the part of the decedent and his next of kin. An additional count charged the driving of the car at a speed "greater than was reasonable and proper, having regard to the traffic and the use of said street, and so as to endanger the life or limb and injure the property of persons using the said streets". Appellant filed the general issue.

The deceased, Isaac N. Stahl, a veteran of the Civil War, of the age of 84 years, was living with his daughter, Mrs. McKibben, in Champaign about two blocks from the place of injury. All of his children were adults, married and living in homes of their own. He was not employed in any way and had no earnings, but received a pension from the Government of \$100.00 per month. He paid no board to his daughter, but purchased some fruit and provisions occasionally. He also paid her room rent, varying from \$5.00 to \$10.00 a month, whenever he felt like it. A married son was working in a garage about four blocks away and the deceased was in the habit of going to this garage every evening, crossing the street at the point where he was injured. He was in good health and had good vision and hearing. About seven o'clock in the even-

ing of October 23, 1931, the deceased started for the garage walking down from the west on the south side of White Street, which ran in an easterly and westerly direction, and approached the southwest corner of White Street where it intersects with Neil Street. There is some dispute as to whether he crossed Neil Street on the south or north walk of White Street, but the witnesses best situated to know, testify that he was on the south sidewalk. Mr. Snook and his adult son were following him on the same side of the street walking in the same direction until they reached the southwest corner of White and Neil Streets, where they spoke to the deceased and turned north to cross White Street and continued north on Neil Street. As they were turning north the deceased proceeded on east and stepped off the curbing and started off across the street. Neil Street runs north and south and is forty-nine feet wide from curb to curb. It is also known as State Highway No. 25. White Street stops at Neil Street and is twenty-nine feet in width. Walnut Street comes into the intersection from the northeast at about an angle of twenty-five degrees east from Neil Street until it is submerged in Neil Street at or about the center line of White Street extended eastward. There were no stop signs to the south of White Street. W. O. Snook testified that as the decedent stepped down off the curb to Neil Street he looked south, which was to his right. He walked $24\frac{1}{2}$ feet to the center of Neil Street and there were no cars coming south toward him at that time. After leaving the center of Neil Street he passed in front of a car driven by a witness, Mrs. Dye. She testified that she started her car from the curb about 150 feet south of where she passed Stahl and that as she pulled out into the street she turned on her dimmers and saw Stahl step down from the curb and walk straight east across the street. She said that when her light shone on him he did not look at her car, but just stepped faster while he was in front of her car: that he did not look south as she could see: that she saw him first about a half a block away and that he passed in front of her car about ten or twelve feet: that just before he got past her car she noticed the lights of a car close behind her and it pulled out to her right: that she heard the breaks on the other car squeak and that after the decedent had taken two or three steps past her car he was struck by the car of the appellant: that when decedent was struck, the car of appellant was immediately to her right and the front part of that car was about even with the rear fender of her car. Mrs. Dye, Appellant Jones and Owen Brown, who was riding on

the running board of Jones' car, were the only persons who saw the deceased after he stepped upon the street and until he was struck. The Appellant Jones came upon Neil Street from the west, out of an alley. After entering the street he came up behind the Dye car driving at the rate of fifteen to twenty-five miles per hour, and pulled over to the right in order to go down Walnut Street. It was a misty night and appellant's lights were lighted. He did not see the deceased until he was within two or three feet in front of appellant's car, at which time appellant testified that the deceased seemed to be standing still and that his face was turned to the east. Owen Brown testified that he was riding on the running board of appellant's car opposite the right front door: that he first saw Stahl fifty feet away and the next time just after he had passed the Dye car, and was four or five feet in front of the Jones car. There is much conflict in the testimony as to just where Stahl crossed Neil Street, just where he was struck, how far he was carried after the impact and how far appellant's car ran after the collision before it stopped but those facts were all in evidence before the jury and it was their duty and province to pass upon such controverted questions of fact. It is clear that Stahl, a pedestrian was crossing Neil Street from west to east, that when he was at least three quarters of the distance across the pavement appellant, travelling north at the rate of 15 to 25 miles per hour, pulled out from behind another car to the right and without observing the deceased, until he was almost upon him, and without any warning struck and fatally injured Stahl.

It was the positive duty of appellant under these circumstances to give reasonable warning of his approach, to use every reasonable precaution to avoid injuring the deceased, and, if necessary, to stop his car so that Stahl could safely proceed. *Gannon v. Kiel*, 252 App. 550. It is argued that the case should be reversed because of the want of due care on the part of deceased. There were no witnesses who saw Stahl during all the time he was crossing Neil Street, but when he stepped down off the curbing he was looking south. When he left the center of Neil Street he stepped a little faster in passing in front of Mrs. Dye's car, indicating that he saw her automobile approaching. Just before he crossed in front of Mrs. Dye's car if he had looked south he would have seen appellant's car travelling north directly behind Mrs. Dye's car. He was not bound to anticipate the sudden action of appellant in turning out from the line of traffic in which he was travelling to go around another car at

a street intersection. The situation in this case can readily be distinguished from the facts in the case of *Wyer v. Ekstrand*, 256 App. 613, and *Greenwald v. B. & O. R. R. Co.*, 332 Ill. 627, cited by appellants.

Upon a careful consideration of the testimony we feel there was sufficient testimony in the record to submit the question of due care to the consideration of a jury. "It is a question of fact for the jury to determine in view of all the surrounding circumstances, whether the failure to look constitutes lack of due care". *Morrison v. Flowers*, 308 Ill. 189.

It is also urged that the Court erred in limiting appellant in his cross-examination of the witness, Dr. Rawlings. He was called in behalf of appellee and testified that he saw deceased in the hospital the evening of October 23rd, and that in his opinion the deceased died as a result of the injuries received in this accident. Appellant sought to cross-examine the doctor on his treatment of the deceased during the year preceding the accident but the Court sustained an objection to this line of cross-examination. Inasmuch as there was no defense set up in the pleadings or in the proof tending to contradict the fact that Stahl died as a result of the injuries received, there was no harmful error committed by the Court in limiting the cross-examination of Dr. Rawlings on that question. Complaint is made of several of the instructions given on the part of the appellee but there was nothing seriously wrong with any of them and taken as a whole the jury were fully and properly instructed as to the law applicable to the issues in the case.

Appellant further urges that the verdict was excessive and in this contention we think there was some merit. The deceased was a man 84 years of age, and was receiving a pension of \$100.00 per month from the United States Government. He was in good health and quite active for his age. From his pension he paid out only small sums to his daughter for room rent. He had a life expectancy of between four and five years so that the verdict of the jury allowed the appellee to recover \$50.00 per month for the entire period of his expectancy. In our judgment that amount was excessive.

If appellee will file in the office of the clerk, within twenty days, a remittitur in the sum of \$750.00, the judgment will be affirmed in the sum of \$2,000.00, otherwise reversed and remanded.

*Affirmed upon remittitur,
otherwise reversed and remanded.*

(Five pages in original opinion)

Abstract
Opinion filed January 12, 1934

PUBLISHED IN ABSTRACT

56 H

T. E. Lyons, Receiver of the Arcola State Bank of
Arcola, Illinois, Appellant, v. Estate of Ralph G.
Ernst, Deceased, Appellee.

Appeal from Circuit Court, Coles County.

273 I.A. 6404
APRIL TERM, A. D. 1933

Gen. No. 8765

Agenda No. 23

MR. JUSTICE FULTON delivered the opinion of the Court.

This is an appeal from the Circuit Court of Coles County, and came to that court on appeal from the County Court. On August 28, 1929, Appellant filed his claim in the County Court against the estate of Ralph G. Ernst, deceased. The claim was based on three notes, two of which were dated August 16, 1920, and one dated February 14, 1920. One was for the principal sum of \$9,000.00, another for \$6,000.00 and another for \$5,400.00, all payable to the Arcola State Bank of Arcola, Illinois. Judgment was rendered in the County Court against the estate for \$33,586.04, and on a trial in the Circuit Court, the jury returned a verdict for the defendant, upon which the Court entered judgment.

The deceased, Ralph G. Ernst, was the son of J. M. Ernst and was in partnership with his father in the grain and coal business under the name of J. M. Ernst & Son at Arcola, the firm transacting its banking business with the State Bank of Arcola. The bank closed temporarily about May 15, 1921, and it developed that the partnership was badly indebted to the bank, first on an overdraft of \$174,000.00, and further on notes of J. M. Ernst & Son. J. M. Ernst and Ralph G. Ernst, individually, amounting to about \$70,000.00, and which amount included the notes in controversy in this suit.

Upon the closing of the bank, Edward C. Craig was called in as an attorney to assist in the collection of the assets of the bank and almost immediately he and T. E. Lyons, vice president of the bank, went out to see J. M. Ernst about their indebtedness. The outcome of the interview was that J. M. Ernst, Ralph Ernst and wife agreed to turn over everything they had to the bank and Craig, shortly thereafter prepared deeds, assignments, transfers, bills of sale and other papers in order to consummate the arrangement agreed upon. The papers were executed by the Ernsts and in the neighborhood of \$50,000.00 worth of prop-

erty turned over to the bank, which consisted of almost every class of real and personal property including the homestead and household goods of Ralph Ernst. The controversy in this case is whether or not a full and complete settlement of these notes was made by the transaction above outlined between the Ernsts on the one hand and the bank through Edward C. Craig and T. E. Lyons on the other. In March, 1927, the Arcola State Bank became insolvent and T. E. Lyons was appointed receiver. He found among the assets of the bank the three notes filed as a claim against the estate of Ralph G. Ernst, who together with his wife, was killed in an accident shortly before the filing of the claim.

The appellee, in defending against the claim introduced the evidence of J. M. Ernst and Florence Dole, who both testified that it was agreed by Craig and Lyons in behalf of the bank that if the Ernsts would turn over everything they had to the bank, it would be accepted in full settlement of all of the debts of the partnership and all of the individual indebtednesses of both J. M. Ernst and Ralph G. Ernst that was due and owing to the bank. The appellant on rebuttal offered the testimony of Edward C. Craig and T. E. Lyons, who both testified that no agreement was made for a settlement in full of the Ernsts' indebtedness by reason of the transfers above described, but that whatever was realized from the property was to apply on the indebtedness. Craig further testified that after the completion of the transfers he paid J. M. Ernst \$400.00 in money for his legal exemptions and delivered to him two insurance policies for his son Ralph. At that time John M. Ernst executed two receipts, one for the exemption payment and the other for the insurance policies. The receipts were written in long hand by Craig and recited "This money was paid me in reference to the turning over of my insurance policies, but no settlement has been made in full of any the liability of Ernst & Son to the said bank." The receipt for the insurance policies contained a similar statement.

Appellant contends that the judgment for the appellee is contrary to the law and the evidence. The appellee supported its defense by the testimony of two witnesses, which was flatly contradicted by the two witnesses for the appellant. It is argued by appellant that the verdict was contrary to the manifest weight of the evidence because there was in addition to the oral testimony, the two receipts above mentioned, and this coupled with the fact that the notes were never surrendered back to the Ernsts tended to impeach the testimony of J. M. Ernst on the point of settlement.

These are circumstances and proof that might well receive the careful consideration of a jury just as it might also consider the circumstances that nothing had ever been done about the collection of these notes from the date of the property transfer in 1921 down to the death of Ralph G. Ernst in 1929.

A court of review is reluctant to set aside the verdict of a jury, and will not do so except, where after giving consideration to the variant stories of the witnesses, it is of the opinion that the verdict is clearly against the weight of the evidence. In a case like this where there was a wholesale transfer of property under an oral agreement made back in 1921, and a direct conflict in the testimony, we feel that it was peculiarly the duty of the jury to determine the credibility of the witnesses as well as the controverted questions of fact. For this court to substitute its judgment on such questions would be invading the province of the jury and the evidence in this record does not warrant the Court in setting the verdict of the jury aside on the grounds that it is manifestly against the weight of the evidence.

Complaint is made of two instructions tendered by appellee and given by the Court. The principles of law omitted were fully covered by other given instructions. Taking all the instructions as a series the jury were fully and properly instructed with respect to the law applicable to the issues in this case.

The judgment is affirmed.

Affirmed.

(Four pages in original opinion.)

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**Jane Chumard, Defendant in Error, v. Frank N.
Goodman et al, Doing Business as Parlor Market,
a Partnership, Plaintiffs in Error.**

Error to Circuit Court of Macon County.

APRIL TERM, A. D. 1933.

273 I.A. 641

Gen. No. 8768

Agenda No. 26

Mr. JUSTICE FULTON delivered the opinion of the court.

This is an appeal to reverse a judgment in the sum of \$3,867.90 rendered by the Circuit Court of Macon County, in a suit for personal injuries caused by an automobile collision at a street intersection in Decatur. The action is in case. The plaintiffs in error by written stipulation have admitted liability, and the only question in the trial court was the extent of the damages suffered by the defendant in error. Trial by jury was waived and the testimony heard before the Court.

As a result of the collision, the automobile in which defendant in error was riding as a guest was knocked some thirty feet toward a curbing and turned over. She was found lying on or near the back cushion and was unconscious when removed from the automobile and taken to the hospital. She had somewhat recovered consciousness when Drs. Tearnan and Rose arrived to attend her. She received a severe laceration over the left eye, a contusion on the left side of her head, some minor cuts and bruises about the head and probably two fractured ribs on the left side. Her eyes were black and discolored and there was evidence of bruises near the points of fracture of the ribs. The lacerations were repaired, her chest strapped with adhesive and she was otherwise treated at the hospital for three weeks by Dr. Tearnan. She suffered considerable pain while at the hospital and was confined to her bed until a few days before she left there, when she was allowed to sit up in a chair.

Prior to the time of the collision she had lived with a sister and testifies that she had been in excellent health, cooked and washed dishes, helped with the general housework, took long walks without tiring, was 61 years of age and weighed 180 pounds. The proof that she was a strong, healthy woman before the accident is not seriously disputed. It is not disputed that she had expended the sum of \$367.90 for doctor's and hospital bills.

The case was formerly in this Court at the October, 1931 term and reversed and remanded because permanent injuries were not proven with reasonable certainty and therefore an instruction permitting the jury to assess damages for the same was erroneous. 265 App. 617. In that trial the defendant in error claimed to suffer from headaches, dizziness, sleeplessness and similar ailments, all of which were subjective symptoms. The trial occurring some four months after the accident, the doctors were unable to state with reasonable certainty that the injuries would be permanent. In the second trial, defendant in error again testified to headaches, nervousness, stumbling and falling from dizziness, inability to work and general deterioration in health. She is corroborated by the testimony of her sister, Mrs. Corman, a distant relative, Mrs. Parks, a neighbor, Mrs. Stewart, and by Dr. Rose, her physician. The attending physicians, Drs. Tearnan and Rose, both testified without qualification that in their opinion the headaches and nervousness of defendant in error are permanent conditions and are attributable to the accident. While their evidence in the former trial was uncertain in this respect, they assign as a reason for the positive statement in the later hearing, the length of time that had elapsed since the injury, which enabled them to form a definite opinion. The period between the date of the collision and the beginning of the second trial was about eighteen months. The testimony of the plaintiffs in error consisted of three medical experts who testified in response to a hypothetical question that they could not tell with reasonable certainty whether the injuries of defendant in error would be permanent. In a somewhat similar case our Supreme Court sustained an instruction to the jury permitting them to assess damages for permanent injuries although there was no medical testimony on the question of the permanency of the same. *North Chicago St. R. R. Co. v. Shreve*, 171 Ill. 438. In the case of *Wever v. Staggs*, 264 App. 556, this Court had occasion to announce and follow the same principal of law.

This case has now been tried twice, once before a jury, who returned a verdict of \$5,000.00, and once before a Court who appears to have given the case careful consideration, after having an opportunity to view the defendant in error and to see and observe all of the witnesses. We believe there is sufficient proof in the record to support the findings of the lower court as to the permanency of the injuries and that the amount of the judgment is not excessive.

The judgment of the Circuit Court of Macon County is therefore affirmed.

Affirmed.

(Three pages in original opinion)

Abstract -
Opinion filed - 11/29/32

302

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PUBLISHED IN ABSTRACT

**Fannie M. Kenyon, Appellant, v. A. H. Penewitt,
Appellee.**

Appeal from Circuit Court of Mason County.

OCTOBER TERM, A. D. 1933.

273 I.A. 641

Gen. No. 8785

Agenda No. 5

MR. JUSTICE FULTON delivered the opinion of the court.

This is an appeal from a directed verdict and judgment thereon in a suit brought by appellant on a promissory note signed by appellee and one J. H. Heberling. The declaration consisted of a special count on the note and the common counts. Appellee filed the general issue and a special plea of the statute of limitations. Appellant filed various replications to the special plea of the statute of limitations which were traversed, and also third and fifth additional replications to which demurrers were sustained. Appellant elected to abide by her additional replications three and five and error is assigned upon the action of the Court in sustaining general demurrers to said additional replications. The sole issue on the pleadings was whether the note was barred as against appellee by the Ten Year Statute of Limitations.

The note was for \$3000.00, dated June 10, 1919, payable to appellant one year after date, with interest at six per cent, and was introduced in evidence. Appellant testified that all interest was paid to June 10, 1931, upon which date the last endorsement appears, but did not state by whom it was paid. Appellee testified that he had nothing to do with the payment of interest from June 10, 1919, to June 10, 1931. Objection to this testimony was overruled and error is assigned because of its admission by the Court.

In rebuttal one J. B. Fager, brother of appellant, testified that on January 27, 1932, he procured from Heberling, co-maker on the note, who had encountered financial difficulties, a chattel mortgage note to appellee for \$3,000.00 and notes to other persons all secured by chattel mortgage. On February 15, 1932, which was about fifteen days after recording the mortgage and a few days after this suit was commenced, he sent the notes and the mortgage to appellee, who has had possession of them ever since. Prior to securing the notes from Heberling, Fager testified to a telephone conversation with appellee in which he told ap-

pellee he was taking this chattel mortgage as security for several notes, including the one to appellant, and for the purpose of indemnifying appellee against any sum he might be required to pay on the note sued on in this suit. Fager also testified to subsequent conversations with appellee principally concerning the latter's liability on another note of Heberling's.

It is the contention of the appellant that the conversations of Fager as the agent of appellant with the appellee show that the appellee admitted his liability on the note sued on in this case, thereby creating an implied promise to pay. Also that the proof shows a ratification by the appellee of the acts of his co-maker in the payment of interest on the note, the last payment being June 10, 1931, and that these facts are sufficient to take the case out of the Statute of limitations in the manner set forth in appellant's additional replications.

The third additional replication alleged that a new promise was made on June 10, 1931. It is our judgment that the Court properly sustained the demurrer to this replication because it failed to state that the new promise was in writing. *Boone v. Colehour*, 165 Ill. 305 and *Katt v. Chapman*, 248 App. 12.

The fifth additional replication alleged a ratification on the part of the appellee in the acts of his co-maker in paying interest but the facts set up in the replication such as the acceptance of the chattel mortgage note of \$3000.00, and the mortgage securing the same along with various other notes and the failure of appellee to repudiate the payment of interest by Heberling, are not sufficient to show such knowledge on the part of appellee as would remove the bar of the statute of limitations and therefore the Court did not err in sustaining the demurrer to the fifth additional replication.

What has been said concerning the facts set forth in the third and fifth additional replications is true of the facts disclosed by the testimony in this case. The burden was imposed upon the appellant to prove facts which would overcome the bar of the statute of limitations. *Ruhl v. Gambill*, 175 App. 641. *Wachter v. Albee*, 80 Ill. 47. There was no proof of a new promise in writing and the testimony does not show knowledge on the part of the appellee of the acts of his co-maker Heberling in the payment of interest on the note. Appellant's prima facie case was lacking in this one essential and therefore it was not incumbent on the Court to submit that question of fact to a jury. For the reasons expressed, the trial Court properly directed a verdict and the judgment will be affirmed.

Affirmed.

(Three pages in original opinion.)

**Lewis McCormick, Appellee, v. Edmund P. Connolly,
Appellant.**

Appeal from Circuit Court, Champaign County.

OCTOBER TERM, A. D. 1933.

Gen. No. 8801

Agenda No. 17

MR. JUSTICE FULTON delivered the opinion of the court.

This case is here on appeal from a judgment entered in the Circuit Court of Champaign County in an action for personal injuries sustained by appellee in an automobile collision occurring on State Route 10 in a small settlement called "Mayview" in Champaign County, Illinois. The declaration originally consisted of three counts. The first count charged general negligence in the operation of appellant's automobile. The second and third counts charged wilful and wanton conduct on the part of appellant but at the close of the appellee's testimony, both were withdrawn. A plea of general issue was filed, a trial had before a jury, and a verdict returned for the appellee in the sum of \$2,500.00 upon which judgment was entered.

Route 10 is a state concrete highway eighteen feet wide running in an easterly and westerly direction through Mayview. On the south side of the cement slab and about eight feet distant therefrom are located two grain elevators. On the opposite side of the slab and some distance west are a couple of stores and a few scattered residences, but at the point where the accident happened and for some distance east of that point there are no buildings located on the pavement. On the day in question the appellee had driven a load of beans to the elevator in a Model T Ford truck. The beans were dumped in the entry way of the easterly elevator and then appellee drove his truck east out of the elevator and down a grade for a distance of about eighty feet where he testifies he stopped, looked both ways, and then started north across the slab and also turned his car part way around to start back west on the pavement. He further testified that a car was passing east on the highway just before he started to cross and that he waited for it to pass before going on the concrete highway. The view along the slab to the west was clear and unobstructed for at least half a mile, but appellee testifies he saw appellant's car first when it was about four feet away and almost at

the instant of the crash. He further stated that his car was headed northwest at the time of the collision; that appellant's car struck his truck at the left front wheel and that he thought his truck was just north of the black line. While there were some cars parked about 200 feet west on the south side of the slab there is no testimony that they obstructed his view and there was at least two or three hundred feet without any obstruction whatever. The accident occurred about one o'clock in the afternoon on a bright sunny day.

The defendant had driven easterly on Route 10 from Champaign with a companion and testifies that he was driving a Ford coupe on the pavement at about forty miles per hour until he approached Mayview, when he slowed down to about twenty miles per hour through that settlement; that when he was approximately sixty feet east of the elevator the truck of appellee came onto the pavement about ten feet ahead of him. He applied his brakes, turned his car to the north and collided with the truck.

Appellant's argument for reversal is directed principally to the question of whether or not there is sufficient evidence in the record of due care on the part of appellee to support the verdict and judgment. There being no charge of wilful and wanton conduct in the declaration the appellee assumed the burden of affirmatively showing that he was in the exercise of due care and caution for his own safety at and just prior to the time of the accident which caused his injuries, or, in the absence of direct testimony, showing such care that reasonable inference of such due care and caution might be drawn from the circumstances disclosed by the evidence. If the negligence of the appellee contributed to the injury, he cannot recover. *Wilson v. Illinois Central Railroad Co.*, 210 Ill., 603. "It has long been the rule in this state that it is the duty of persons about to cross a dangerous place to approach it with care commensurate with the known danger, and when one on a public highway fails to use ordinary precaution while driving over a known dangerous place, such conduct is by general knowledge and experience of mankind condemned as negligence." *Greenwald v. Baltimore & Ohio R. R.*, 332 Ill., 627. "One having an unobstructed view of a dangerous crossing on a highway is not justified in closing his eyes or failing to look in reliance upon the assumption that that highway is free and open to travel. The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the danger when the view was unobstructed and where, if he had

properly exercised his sight, he would have seen it." *Dee v. City of Peru*, 343 Ill., 36. In the same case the Court said: "When there is any evidence before the jury, which, taken with its reasonable inferences in its aspect most favorable to the plaintiff, tends to show the use of due care, the question of due care is one for the jury. Whether there is any such evidence is a question of law." The record in this case discloses nothing whatever to excuse appellee from looking west and observing the approach of appellant's car. The car must have been somewhere near at hand and there was nothing to obstruct the view of it. No reasonable mind can draw any other conclusion from appellee's own testimony, than that he was not free from contributory negligence in failing to see the approach of appellant's car which must have been in clear view and at a time and place where appellee well knew a car might be coming. The trial court erred in not instructing the jury to return a verdict for the appellant and the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

(Three pages in original opinion.)

304

Abstract

PUBLISHED IN ABSTRACT

60 7

In the Matter of the Conservatorship of William
Steel, Incompetent.

Appeal from Circuit Court of Champaign County.

OCTOBER TERM, A. D. 1933.

273 I.A. 64 74

Gen. No. 8810

Agenda No. 20

MR. JUSTICE FULTON delivered the opinion of the court.

T. B. Weber, the appellee herein, qualified and acted as Conservator of William Steel, an incompetent person, on the 13th day of June, 1929, by appointment of the County Court of Champaign County. Steel had been the ward of another Conservator for some time previous to the appointment of the appellee, and after the appointment of the appellee, Mr. Bohlen, the former Conservator, turned over to the appellee the sum of \$1592.09 on July 15, A. D. 1929, and this amount represented the entire estate belonging to the incompetent, with the exception of a note in the amount of approximately \$300.00, which note however, is not involved in this proceeding. At the time the money was turned over to the appellee by the former conservator, it was on deposit in the Urbana Banking Company Bank at Urbana, Illinois, which the evidence discloses at the time mentioned, was the largest bank in Urbana in assets and amount of deposits, and reputed to be of undoubted solvency. Thereafter, however, on the 15th day of October following, it failed to open its doors for business and its affairs are now in the hands of a receiver. Thereafter on December 20, 1932, the appellee filed his final report as Conservator in the County Court, and in his report he asks credit for the amount which had been on deposit in the Urbana Bank, amounting to the sum of \$1525.10, and for which a claim had been filed with Roger F. Little, the Receiver of the Urbana Bank. The appellants objected to the allowance of the credit, and based their objection on the statutory ground that as conservator, the appellee had not properly and promptly invested the money of the incompetent, and that therefore the money wrongfully and negligently was allowed to remain in his hands, uninvested, after the same might have been invested, and that he was therefore liable. Section 18, Chap. 86, Smith-Hurd Revised Statutes. Facts disclosed by a stipulation and by the testimony of appellee who testified concerning the contraverted matters, and

in explanation of his management of the Steel estate, were substantially as follows: that at the time appellee received the money from the former conservator on July 15, 1929, he did not even know his ward who lived part of the time with a sister and part of the time with a brother, near the town of Royal, about twenty miles distant from Urbana, the home of appellee; that shortly after, he was appointed, the brother and sister both appeared and presented claims for board and lodging for the ward during the period of time prior to his appointment, and the controversies over said claims were not entirely settled until in October, 1929: that there were other claims of grocers and other parties furnishing necessities to the incompetent ward: that on August 19, 1929, the ward filed a petition in the County Court asking to be restored to his legal rights and that a hearing was had on said petition on August 21, 1929, resulting in a denial of the prayer of the petition: that the amount to be recovered on the \$300.00 note turned over to him by the former conservator was in doubt: that he was unable to accurately determine just what the needs of his ward would be for the future and could not safely decide on just what amount he would have for the purpose of investment at any time before the bank closed. Upon the hearing, the Court overruled the objection to appellee's report, and approved the same. This appeal is prosecuted from the order of the Court approving the appellee's report and that is the only question involved in this appeal.

It is clear from the stipulation and the undisputed testimony of the appellee that there was no violation of appellee's statutory duties in his management of the estate of the incompetent: that the circumstances occurring after his appointment and until the closing of the bank justified the delay in the investment of the funds: and that he did not wrongfully or negligently allow the funds of the estate to remain in his hands uninvested for an unreasonable length of time after the same might have been invested. The finding and judgment of the Circuit Court for the reasons stated was proper and in accordance with the law and the evidence, and the judgment is therefore affirmed.

Affirmed.

(Three pages in original opinion.)



273 I.A. 641

FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 14.

AGENDA NO. 22.

JOE SEELEY,
Plaintiff in Error,

vs.

FRED ROHRKASTE,
Defendant in Error.

Error to,

County Court,

Madison County.

EDWARDS, P. J:

Plaintiff in Error, hereafter designated as plaintiff, brought suit before a Justice of the peace of Madison County, against defendant in error, who will be referred to as defendant, to recover damages claimed to have been sustained in and automobile collision. There was a recovery in the Justice Court, from which defend-

ant appealed to the County Court, where, upon a trial before a jury, a verdict was rendered in favor of defendant. The court entered judgment, upon the verdict, which plaintiff seeks to reverse by this writ of error.

The evidence discloses that on November 20, 1932, defendant, accompanied by his wife, Linda Moore and William Volmer, was traveling easterly along State Highway No. 159, from Wood River to his home in Edwardsville, at about 1:30 A. M. Plaintiff, in company with Dorothy Alexander, at the same time was proceeding westerly over said highway. About three miles west of Edwardsville there is a steep hill, at the summit of which the two cars collided; as a result of which the auto of defendant was seriously damaged. It is not disputed that at the time, plaintiff's car had a single light burning, it being the one on the right front of the machine.

Plaintiff testified that just before the collision, he observed defendant's car, and saw it was partly over the left side of the black

line which designates the center of the cement slab; that it was zigzagging from side to side, and that his own auto was wholly to the right of such line. Miss Alexander corroborates him in the statement that he was to the right of the black line; however, she admits that, a short time after the accident, she signed a written statement that at the time of, and just prior to the collision, her eyes were closed, and she did not know the position of Defendant's car with reference to the center of the cement roadway; that she did not see the auto with which they collided, nor know its rate of speed, nor its position with respect to the black line on the slab.

Defendant testified that he observed the approaching car of plaintiff as he neared the top of the hill, and saw that it only had one head-light, and that on the right side; that he was on the right side of the center line before and at the time of the collision, and that thereafter, when his car came to rest, it was on the right side of the road. He is fully corroborated

on this point by the statement of William Volmer. Miss Moore testified that she was asleep and did not see the position of the cars. The wife of defendant, not being a competent witness, was not called to testify. There was also the testimony of several witnesses that defendant, during the trial in Justice Court, stated that his car was over the black line just before the accident, and that he was zigzagging back and forth. This was denied by defendant. Plaintiff was permitted to testify that just prior to the collision, his car was of the fair, cash, market value of \$345.00, and that afterwards he disposed of it to Bothman Motor Co. for \$25.00. He offered to prove that a year or two prior to the accident, he paid \$683.00 for the machine. Objection to the offer was sustained.

It is thus seen that the testimony, on the vital question as to which side of the

black line the cars of the respective parties were on at the time of, and immediately preceding, the accident, sharply conflicted, hence it was the province of the jury to determine the fact. With their superior opportunity for testing the credibility of the witnesses and determining the truth as to the question, and the approval of their finding by the trial judge, who also had the advantage of seeing and hearing the witnesses, we would not be warranted in holding that their verdict thereon was wrong.

Plaintiff complains that the court refused to permit him to make proof as to what he paid for the car a year or two prior to the accident. The proffered evidence was not competent, and the court properly sustained defendant's objection to the offer.

The principal contention of plaintiff is as to the action of the trial judge, in certain of the given instructions for defendant.

Instruction No. 1 enumerated the various

elements plaintiff was required to establish, by the preponderance of the evidence, to warrant a recovery. and also told the jury that if the evidence was evenly balanced, so that the jury were unable to say on which side the preponderance lay, or if it were on the side of defendant, then defendant was entitled to a verdict of not guilty. The instruction merely designated the elements which plaintiff must prove, by the greater weight of the evidence, to entitle him to a verdict, and properly charged the jury as to their duty, if it were not so proved. There was no error in the giving of the instruction. *Murphy v. C. M. & St. P. Ry. Co.*, 210 Ill. App., 188.

In the second given instruction the jury were told, in the language of the statute, that a motor vehicle upon a public highway, during the period of one hour after sunset, to sunrise, should carry two lighted lamps, visible in the direction toward which the vehicle is proceeding,

and that if they believed from the evidence that plaintiff failed to carry two lighted lamps at and immediately prior to the collision, and that such failure, if any, proximately contributed to the accident, then the verdict should be for the defendant.

"We think the instruction was properly given. The law makes such requirement as to lighted lamps. There was proof that plaintiff, at the time, had but one lamp lighted. It left it to the jury to determine whether such was the fact, and if so, whether such failure contributed proximately to the accident; in which event defendant would be entitled to a verdict. The instruction correctly stated the law bearing upon the several elements it contained, was based upon the testimony in the record, and was properly given. *Miller v. Burch*, 254 Ill. App., 387.

Instruction No. 3 told the jury that if they believed from the evidence that plaintiff, by using his faculties with ordinary and reason-

able care, in looking out for danger, would have avoided the injury in question, that he negligently failed to do so, and thereby contributed to his damage, then the verdict should be for the defendant. Such an instruction, in almost its literal phraseology, was given in *Flynn v. Chicago City Ry. Co.*, 250 Ill., 460, and held to correctly state the law.

Lastly, the 4th given instruction informed the jury that if they found from the evidence that both plaintiff and defendant were negligent, and that the negligence of both contributed to and did directly cause the damage complained of, it was the jury's duty to return a verdict for the defendant. The principle of law, thus set forth, is correct, and the proof was such that it was proper to submit such question to the jury. *West Chicago St. Ry. Co. v. Liderman*, 187 Ill., page 468.

We find no reversible error in the record, and the judgment will be affirmed.

Judgment affirmed.

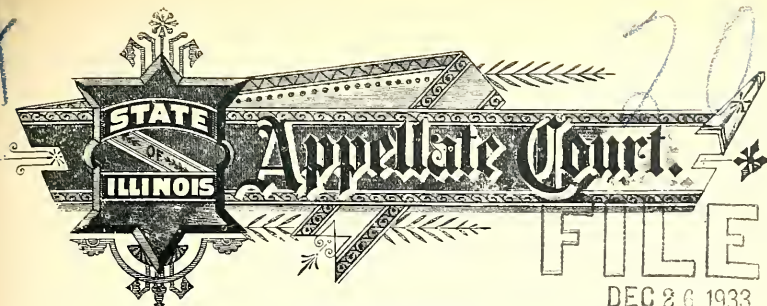
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FILED

DEC 26 1933

Walter M. Buckner

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

TERM NO. 4.

AGENDA NO. 3.

DOROTHY WUEST,
Appellee,

273 I.A. 642

vs.

Appeal from

F. B. HELLRUNG,
Appellant,
and
L. D. HOFFMAN,
Defendant.

Circuit Court

Madison County.

MURPHY, J.:

Appellee, instituted her suit in the Circuit Court of Madison County against L. D. Hoffman, the Edwardsville Creamery Company, and appellant, to recover damages for injuries alleged to have been sustained in a collision between appellant's truck and defendant Hoffman's automobile at the

intersection of Summit Avenue and Ninth Street in East St. Louis.

The case was tried on a declaration consisting of one count. It was alleged that appellee was, on March 21, 1931, riding as a guest in Hoffman's automobile; which was traveling in a westerly direction on Summit Avenue; that the Creamery Company and appellant were driving a truck in a southerly direction on Ninth Street; that the streets intersect; and that Ninth Street was a preferential traffic street by reason of a city ordinance and certain state highways being routed over it. The specific negligence charged against Hoffman was his failure to stop his automobile before driving into said intersection and that his negligent acts were committed concurrently with the negligent acts of the Creamery Company and of appellant who were specifically charged with negligence in driving their truck at said intersection at a speed greater than twenty miles per

hour and greater than was reasonable and proper, having regard to the traffic and the use of the way.

General issue pleas were filed by Hoffman and appellant. The Creamery Company filed a special plea, denying ownership of the truck driven by appellant. At the close of her evidence, appellee dismissed the suit as to the Creamery Company. The trial resulted in a verdict against Hoffman and appellant for Six thousand dollars. Separate motions for new trial were made by each defendant and overruled. Judgment was entered on the verdict and appellant perfects his separate appeal to reverse that judgment.

At the conclusion of appellee's evidence and at the close of all the evidence, appellant moved for a directed verdict, which was overruled. Appellant contends that the court erred in overruling his motion for a directed verdict, in the giving of instructions tendered on behalf of

Hoffman, and in refusing certain instructions tendered by appellant.

The evidence shows that both streets were paved and of about equal width; that Ninth Street was a preferential traffic street as alleged in the declaration; that there was a stop sign on the north side of Summit Avenue, near the east line of the intersection; and that the intersection was in a residential district. There is a conflict in the evidence as to whether this stop sign was visible to the occupants of the Hoffman automobile. Part of the witnesses claimed that it was hidden from their view by a large truck which stood near the curb line while other witnesses testified that it was parked farther east and did not obstruct the view. At any rate, appellee testified that she had known this intersection for many years, traveled it nearly every day, and knew of the stop sign. It appears that she did not do or say anything to call Hoffman's attention to the stop sign

or the fact that Ninth Street was a preferential traffic street.

The evidence shows that at the time of the collision there were six persons in the Hoffman automobile, appellee on the right side of the rear seat, two ladies to her left and Hoffman driving the car, and two ladies in the front seat. The accident occurred about noon. Appellant's truck weighed about a ton and one-half and had a load of milk of about equal weight. He was driving his truck and had a helper riding with him.

Some of the witnesses testified that Hoffman's car, as it approached Ninth Street was travelling from fifteen to twenty miles per hour and that it slowed down as it neared the intersection but no witness testified that it came to a stop. Other witnesses fixed the speed from thirty-five to forty miles per hour and denied that it slowed down as it approached the intersection.

At the time of the collision, the rear of the Hoffman automobile was near the center of the intersection. The front of the truck collided with the right rear part of the Hoffman car. There is evidence to show that the truck came to a stop after application of the brakes causing the sliding of the wheels for five or six feet. The automobile was overturned and came to a stop in the intersection, lying in a north or northwesterly direction.

There is a conflict in the evidence as to the speed of appellant's truck, it being variously estimated eighteen to thirty-five or forty miles per hour. It appears that there was an oil truck ahead of appellant and appellant was overtaking and passing to the left of this truck as they approached the intersection. The driver of the oil truck testified that his truck was geared to a maximum speed limit of eighteen miles per hour and that he was driving "wide open". To avoid colliding with

Hoffman's automobile, the driver of the oil truck drove west on Summit Avenue ahead of the Hoffman car.

There is evidence in the record tending to prove that appellant was driving his truck at an excessive speed considering the traffic and use of the way.

Appellant contends that since appellee knew of the stop sign and knew that traffic on Ninth Street had the right of way over traffic on Summit Avenue and yet did not do or say anything to warn Hoffman of that fact, she is guilty of such contributory negligence as to bar her right of recovery.

It is conceded that Hoffman was negligent in not stopping before driving his automobile into the intersection but his negligence in that regard could not be imputed to appellee. However, this rule does not relieve appellee from the burden of proving that she was, immediately prior to and at the time of the accident in the exercise

of due care for her own safety. *Copp v. Pryor*, 294 Ill. 538; *Flynn v. Chicago City Railway Co.*, 250 Ill. 460; *Pienta v. Chicago City Railway Co.*, 284 Ill. 246.

The question of contributory negligence is ordinarily one of fact for the jury, which must be determined from all the facts and circumstances surrounding the injury. It is a question of law for the court to determine whether under the facts and circumstances of each particular case there is any evidence tending to prove due care, and if there is such, then the case should be submitted to the jury and the court cannot say, as a matter of law, that the plaintiff has been guilty of such contributory negligence as to bar the right of recovery.

In *Stack v. East St. Louis Railway Co.*, 245 Ill. 308, the court said, "There is no rule of law which prescribes any particular act to be done or omitted by a person who finds himself in a place of danger. In the variety

of circumstances which constantly arise it is impossible to announce such a rule. The only requirement of the law is that the conduct of the person involved shall be consistent with what a man of ordinary prudence would do under like circumstances."

Appellee, riding in the back seat of the car, had no control over its operation. There is evidence which tended to prove, if believed by the jury, that Hoffman was driving toward this intersection at a moderate rate of speed, that his automobile was slowing down as it approached the intersection. Under such circumstances, there would be no reason for appellee to suspect that Hoffman would not bring his car to a stop before passing into the intersection.

"If a person has no reason to suspect danger, he is not required to look for it." *Miller v. Burch*, 254 Ill. App. 387; *Mellish v. Thorne*, 150 Ill. App. 237.

"A passenger riding as an invited guest is

only bound to exercise such care as the exigencies of the situation require." Waitrovich v. Black, 254 Ill. App. 49; Fredericks v. Chicago Railway Company, 208 Ill. App. 172.

There was no error in overruling appellants motion for a directed verdict.

Appellant's refused Instruction No. Six told the jury that if they found Hoffman operated his car in a negligent manner and that the plaintiff did nothing to prevent such negligent operation of the car and did not call Hoffman's attention to his negligence but acquiesced therein and such negligence contributed to plaintiff's injury, then as a matter of law, Plaintiff could not recover. It was proper for the jury to take into consideration appellee's failure to protest to Hoffman as to his negligent operation of the car but there were other facts and circumstances as above pointed out which the jury should consider in determining whether appellee's negligence contributed

to her injury and thereby barred her recovery. The instruction was properly refused.

At the request of Hoffman, the court instructed the jury that the law giving vehicles approaching from the right, the right of way over vehicles approaching from the left, does not apply when the vehicle to the left is in the middle of the intersection and the one to the right has not entered the intersection.

In passing upon a similar instruction the court in Riddle vs. Mansager, 254 Ill. App. 68 said:

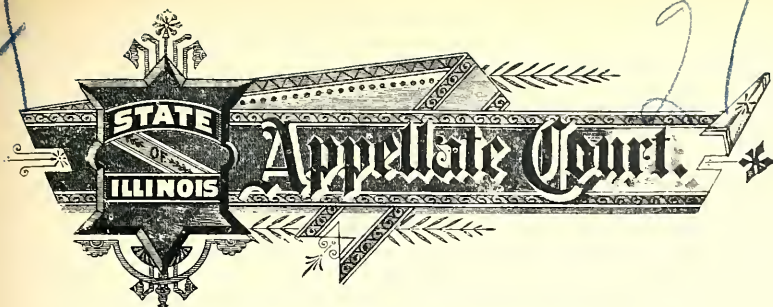
"No such rule of law obtains. The driver approaching from the right has the right of way over one approaching from the left, unless the car on the right is sufficiently far away, so that if driven with due care, it will not reach the intersection until the car from the left can pass. (Heidler Hardwood Lumber Co. v. Wilson & Bennett Mfg. Co. 243 Ill. App. 89) Any other interpretation of the statute would encourage racing to the intersection. It is the purpose of the law to give the driver on the right a preference in passing through the intersection and it is the duty of

the driver on the left to respect that right in accordance with the rule herein laid down."

The instruction complained of omitted the necessary limitation embodied in the foregoing rule. This instruction was subject to a further criticism. The traffic over Ninth Street had a preference over traffic on Summit Avenue and by reason of this, the law imposed the duty upon Hoffman to stop his automobile before entering the intersection, regardless of the distance of appellant's truck from the intersection. The instruction given ignored this duty resting on Hoffman and was liable to mislead the jury into believing that Hoffman was not required to stop before entering the intersection if it was possible for him to reach the middle of the intersection before appellant had entered it. It was prejudicial error to give this instruction.

For the reason given, the judgment is reversed and cause remanded.

Reversed and Remanded.
Not to be published in full.



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 10.

AGENDA NO. 24.

SULLIVAN WELLS,
Plaintiff in Error,

vs.

UNITED AMERICAN BENEFIT
ASSOCIATION, a Corpora-
tion,

Defendant in Error.

273 I.A. 642²

Error to

Circuit Court

Jasper County.

MURPHY, J:

Plaintiff in Error, hereinafter referred to as the plaintiff, instituted his suit in the Circuit Court of Jasper County to recover on a benefit certificate issued by the defendant in error, hereinafter referred to as the defendant, on the life of Tibby Wells, mother of the plain-

tiff, and in which the plaintiff was named as beneficiary. The certificate was dated December 12, 1929 and the face value was \$500.

All questions presented on this record have been disposed of by the opinion filed during the present term of this court in the case of Swann v. National Union Benefit Association and that case is controlling here, excepting on the question as to whether or not a preponderance of the evidence establishes that Tibby Wells died from one of the chronic ailments in the "Chronic Disease" clause of said certificate.

The only witnesses testifying as to the cause of death of the insured were the plaintiff and Dr. C. M. Horton.

The plaintiff testifies that the insured lived in his home and that he saw her every day for some time prior to the date of her death on January 24, 1930; that she had made no complaint of being ill and appeared to be in

good health at all times from the date of the issuance of the certificate until the date of her death.

Dr. Horton testifying by deposition on behalf of the plaintiff, stated that he had known her for several years and treated her professionally for minor ailments, such as colds and digestive disturbances; that the last time he had seen her was in September, 1929 and at that time she was suffering from a mild attack of the grippe; that he did not see any symptoms or indications of any chronic disease. He stated that as coroner of the county, he made a report on what the members of her family told him. Defense offered in evidence the affidavit of Dr. Horton which was furnished in connection with the proof of death. In that proof, he stated the cause of death to be apoplexy and in answer to the question "Did any chronic condition exist?" replied "Yes" and in response to the question whether there was a chronic disease or

ailment. answered, "Yes--as shown". In another statement, he said that she had Bright's disease. Certain of his answers to other questions of similar import are inconsistent and contradictory to the answers given in his deposition.

The burden of proof to establish the cause of death rested upon the defendant (Swann v. National Union Benefit Ass'n) and after a consideration of all the evidence, we are of the opinion that it has failed to establish by a preponderance of the evidence that the death of Tibby Wells was caused by one of the chronic diseases enumerated in said "Chronic Disease" clause, which clause was identical with that passed on by this court in Greene v. United American Ben. Ass'n., 269 Ill. App. 71.

The court erred in limiting plaintiff's recovery to two-fiftieths of the face value of the certificate.

The judgment is reversed and the cause remanded with directions to render judgment for

the plaintiff and against the defendant for the face value of the certificate together with interest thereon in accordance with law.

Reversed and Remanded with Directions.

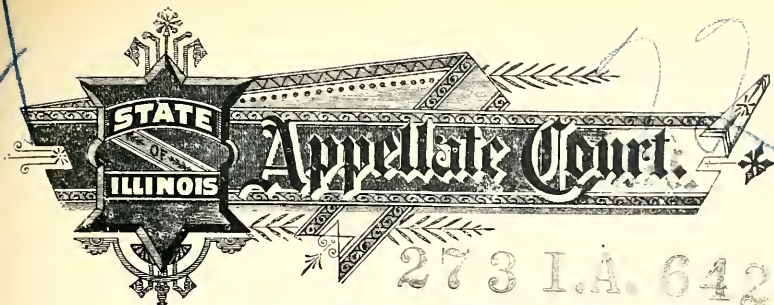
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FILED

DEC 26 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 13.

AGENDA NO. 6.

GLADYS McDONALD,
Appellee,

vs.

ILLINOIS TERMINAL
COMPANY and ST.
LOUIS ELECTRIC
TERMINAL RAILWAY
COMPANY,
Appellants.

Appeal from
City Court of
Granite City.

MURPHY, J:

Appellee filed her suit against appellants in the City Court of Granite City to recover damages for personal injuries alleged to have been sustained when she was boarding one of appellants' street cars for the purpose of be-

coming a passenger.

The declaration upon which the case was submitted to the jury contains two counts, the first charging negligence in moving and suddenly jerking or starting the car while appellee was boarding the same and before she had a reasonable opportunity to safely board the car; and the second alleging negligence in starting and jerking the car before appellee was safely aboard. General issue plea was filed. A trial resulted in a verdict for appellee for \$2110. and after denying a motion for new trial, judgment was entered on the verdict.

One of the grounds urged for reversal is that the verdict, finding appellants guilty of negligence as charged, is against the manifest weight of the evidence.

About five o'clock on the morning of July 26, 1932, appellee, a woman 23 years of age, went to the intersection of State and 22nd

Street in Granite City for the purpose of becoming a passenger on appellants' car to ride to her work in St. Louis. It was raining and as the street car approached the intersection, she raised an umbrella and started toward the place where the car stopped.

Passengers entered the car by the rear door. The door was opened and closed from inside by means of a lever operated by the conductor. As the door opened, the lower step came into position for passengers to step up on. The opening and closing of the door operated an automatic electric signal light in the front part of the car near the motorman. There was a signal rope extending from the front of the car to the rear which was used to ring a signal bell, giving notice to the motorman when to stop and start.

There is a conflict in the evidence as to the distance appellee was from the car entrance when it stopped and the speed with which she traveled to it. All the evidence agrees that the

car was stopped, the door opened and the lower step in position when she arrived at the entrance. She testifies that she lowered the umbrella before stepping on to the lower step; while conductor Merz says she stepped on the step, had the umbrella in her hand, and was using both hands to put it down when she fell. There is no conflict in the evidence that she fell inside the car and that after she fell the door was still open. As to what occurred after she stepped on to the lower step, appellee testified, "No, I did not have hold of anything when I stepped with both of my feet on the first step. I stepped onto the car and tried to reach for this thing (hand rail) and the car jerked and I didn't get hold of it. I had my umbrella on my right arm. The grab iron was right at my hand. I don't know whether there are two grab irons. There is one on the left side. As I was standing on the first step, the grab

iron was within a few inches of my hand, then the car gave a jerk and a grinding noise like wheels make, and threw me into the car. I was standing on the first step, the one that lowers. After I fell on the rear platform, my feet were projecting way over the first step, outside the car."

Conductor Merz testified he was an eye witness to appellee's fall and he says, "Well, I looked around and saw her running for the car and she stepped up for the back step, -she was in a hurry and she had her umbrella up and was trying to let it down, and just as she came up she said, "Oh" and just at that time she caught her toe on the step and then fell headlong along the platform against the dash of the car. There was no movement (of the car) whatever. What caused her to fall was, she caught her foot on the top step. She landed on the first step all right, and then she caught her toe on something and fell her length on the platform. By her step-

ping on the car she was in an angle and naturally she fell more to her right side".

Allen and Harding, employees of appellant, who were in the front of the car, testified they did not see appellee fall but that the car did not jerk or move.

Gomerch, a passenger seated in the car was facing forward and says that there was no movement or jerking of the car or grinding of the wheels. On cross-examination, he made statements inconsistent with his evidence in chief but not on the starting or movement of the car.

Wiehardt, the motorman of the car, says that it did not jerk or move. He relates a conversation he claimed to have had with appellee when they were near her destination in which he asked her if she was hurt, to which she replied, "No, just scratched on the arm and shoulder", that he then asked her how it happened, to which she replied that

she was in a hurry--that she hit the first step and did not get her foot high enough to clear the other step and fell. Appellee denied having any such conversation. Conductor and motorman both testify that there was no signal of any kind for the car to move until after appellee was assisted from the floor to a seat in the car.

Appellee produced two witnesses who were employees at the same place where she worked and were passengers on the car. They were seated facing toward the front end of the car. They testified to having heard a noise caused by appellee's fall but they were not asked as to any noise or grinding of the car wheels or as to any movement or jerking of the car.

The conductor assisted appellee in getting up from the floor and to a seat in the car. She continued on her journey to St. Louis and the conductor testified that during the trip he had conversations with her about the fall and

that she did not at any time attribute her fall to the sudden moving or jerking of the car.

Appellee is the only witness who testified that the car moved or jerked and in this she is contradicted by several witnesses as above pointed out, some of whom testified positively that there was no movement or jerking of the car and the evidence of the others amounts to a contradiction and denial of appellee's evidence on that point.

It is the settled law of this state that if the verdict is manifestly against the weight of the evidence, it is the duty of the trial court to set it aside and grant a new trial and a failure to do so is error for which a judgment must be reversed. *Donelson v. East St. Louis Ry. Co.*, 235 Ill. 625; *Belden v. Innis*, 84 Ill. 78.

The preponderance of evidence in a case is not to be determined alone by the number of wit-

nesses but where the uncorroborated testimony of the plaintiff on a material matter is directly contradicted by other credible witnesses and facts and circumstances corroborative of the evidence of such witnesses, the verdict cannot stand, for under such conditions, the plaintiff has failed to make out of his case by such a preponderance of evidence as the law requires. Heide v. Schubert, 166 Ill. App. 586.

From a consideration of all the evidence and facts and circumstances, we conclude that appellee is not sufficiently corroborated in her testimony on the material point of the movement of the car to sustain the verdict as against the evidence of the five witnesses offered on behalf of appellants and the facts and circumstances corroborating their testimony and that therefore the verdict was manifestly against the weight of the evidence on the question of the negligence of appellants and cannot be sustained.

Appellants also contend that appellee has

not proven by a preponderance of the evidence that her physical condition complained of was the result of the accident in question and that the verdict is against the manifest weight of the evidence in that respect.

Appellee contends that by reason of the fall she suffered a dislodgment of a kidney, causing what is termed a moving and rotated kidney, that this was followed by a kink in the ureter necessitating an operation to remove the kink and to anchor the kidney.

It is undenied that appellee received a fall and that she suffered some injury from it. There is evidence to the effect that soon after her arrival at the place where she was employed, she was forced to stop work for a time, that she vomited several times and suffered pain, that she did not return to her work after that date, and in a few days an operation was performed for the ureter and kidney trouble. The opinion of the doctor

who was caring for her and who performed the operation was that the fall caused the injuries in question. Other doctors in answer to a hypothetical question gave it as their opinion that the moving and rotated kidney was of long standing and not caused by the fall. In this state of the record, it was a controverted question of fact for the jury and we cannot hold that their finding on that point was manifestly against the weight of the evidence.

Error is assigned on Instruction No. 20, given at the request of appellee. This instruction told the jury that if they found the issues for the plaintiff, they would be required to determine the amount of her damages and that, "in determining the amount of damages plaintiff is entitled to recover in this case, if any, you have a right to, and should, take into consideration all the facts and circumstances as proved by the evidence before you; the nature and extent of plaintiff's physical

injuries resulting from the fall in question, if any, so far as the same are shown by the evidence", and then went on to specify the different elements of injury and damage which may properly be considered by the jury and then concluded, "and you may find for her such sum as in your judgment, under the evidence and the instructions of the court in this case, will be a fair compensation for the injuries she has sustained or will sustain, if any, so far as such damages and injuries, if any, are claimed and alleged in the declaration". Two points of criticism are urged against the instruction, first, that it permitted the jury to give appellee damages for the fall she received regardless of whether the injuries were caused by the negligence of appellants or by her stumbling and falling; and, second, because it refers to the declaration.

This instruction was similar to the instruction approved by the Supreme Court in Chic.

& Mil. Elec. Ry. Co. vs. Ullrich, 213 Ill. 170; Parmelee Co. v. Wheelock, 224 Ill. 194; Brennan v. City of Streator, 256 Ill. 468 and by the Appellate Court in Caughey v. Peoria Ry. Co., 164 Ill. App. 455 but the objections urged here are different from the ones disposed of in those cases.

The instruction is not subject to the first objection pointed out for the reason that the consideration of the question of damages is based solely upon the jury first finding the issues for the plaintiff on the question of liability. Instruction No. 10, given at the request of appellants, also told the jury that they must first find that the negligence of the defendants was the proximate cause of the plaintiff's injury and if they did not find such fact, they would not have occasion to consider the question of damages. The jury could not have been misled in the giving of this instruction. The reference in the instruction to the declaration was solely for the

purpose of referring the jury to matters they could consider in fixing the amount of damages in the event that they had found the issues for the plaintiff on the question of the negligence charged. Such reference to the declaration does not make the instruction bad. *Bernier v. Illinois Central R. R. Co.*, 296 Ill. 464; *Bonato v. Peabody Coal Co.*, 248 Ill. 422.

That part of the instruction above quoted which told the jury that in determining the amount of damages they had a right to take into consideration all of the facts and circumstances is criticized in *Garvey v. Chicago Rys. Co.*, 339 Ill. 276 and while it was there held it was not reversible error to give it in that form, we call attention to it so that it may be corrected on new trial.

For the errors pointed out, the judgment of the lower court is reversed and the cause remanded.

Reversed and Remanded.

Not to be published in full.

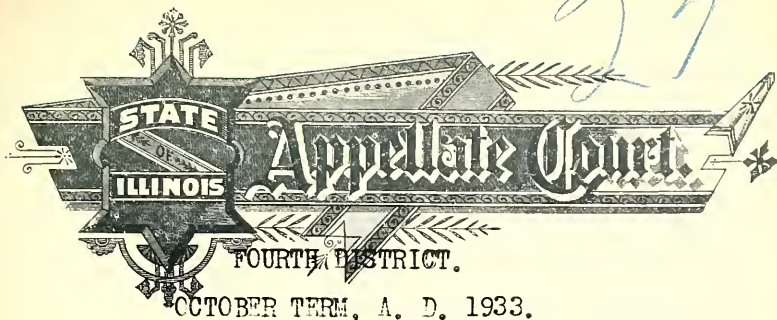
FILED

DEC 26 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

103



TERM NO. 15.

AGENDA NO. 21.

FRANKLIN COUNTY BUILD-
ING ASSOCIATION, a Corp-
oration,

Appellee,

vs.

FRANK SHAVITZ, G. S.
WOOTERS, HERMAN REA
and HOSEA REA (Herman
and Hosea Rea appeal-
ing)

Appellants.

273 I.A. 642⁴

Appeal from

Circuit Court

Franklin County.

MURPHY, J:

This is an appeal from an interlocutory
order entered by the Circuit Court of Franklin
County, appointing a temporary receiver.

Appellants were defendants in the court

below and have perfected their appeal to this court. There is no appearance in this court by appellees and having failed to appear and file brief and arguments in compliance with the practise of this court, the order of the Circuit Court is reversed.

Order Reversed.

Not to be published in full.

FILED

DEC 26 1933

Wm. M. Buchanan

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 24.

AGENDA NO. 12.

CARL WOLF,

Appellee,

vs.

GEORGE SCHMITT,

Appellant.

Appeal from

City Court

Granite City.

MURPHY, J.:

This suit was started in justice court and appealed to the City Court of Granite City, a trial there resulting in a judgment for appellee for \$160.16.

Various grounds for reversal are urged but the substance of them is that the verdict is not supported by a preponderance of the evidence and

that error was committed in admitting appellee's Exhibit No. 5 in evidence.

In April, 1931, appellant bought a certificate of purchase on certain lots which had been issued pursuant to a decree in a foreclosure suit. The certificate was dated April 6, 1931. Soon after the purchase of the certificate and before assignment to appellant, he began negotiations with appellee to sell him the certificate. A verbal agreement was reached April 17th and appellee then paid appellant \$4064.45 and the certificate was then assigned from appellant's vendor direct to appellee.

The controversy arises over the terms of the verbal agreement as to which party was to pay the taxes then existing on the lots described in the certificate.

Appellee's version is that the purchase price was \$4064.45 which was to be clear of all taxes; that he was to advance the tax money and to be reimbursed for that amount by the one re-

deeming from the certificate of purchase, if there was a redemption; and if there was no redemption, appellant was to repay him. The taxes were then estimated to be \$163.43 but the amount actually paid by appellee was \$160.16 which payment was made May 8, 1931. Appellee was partially corroborated in this version of the agreement by the testimony of his sister. On cross-examination, appellee gave answers somewhat at variance with his testimony in direct.

Appellee, as a part of his case in chief, offered in evidence a paper in the hand writing of appellant's son and claimed to have been made at the time of the agreement which is as follows:

| | |
|-------------------------|------------------|
| To be paid by Carl Wolf | \$4227.88 |
| | 163.43 |
| | <u>\$4064.45</u> |

Taxes to be refunded \$163.43

On the opposite side of which appears:

| |
|------------------|
| \$3400.00 |
| 664.45 |
| <u>\$4064.45</u> |
| 163.43 |
| <u>\$4227.88</u> |

Appellant's version of the agreement is that the purchase price was \$4227.88 and that the taxes estimated at \$163.43 were deducted from the sale price, leaving \$4064.45 to be paid him, which he had received, and that the taxes, having been deducted in the first settlement, nothing further remains to be repaid by him. He does not testify as to what the agreement was in reference to the tax money paid by appellee in the event of a redemption from the certificate of purchase. Appellant is corroborated by the testimony of his son. He contends that the above quoted exhibit supports his version of the agreement.

The conflict arises on the purchase price, was it \$4064.45 and was appellant to repay \$160.16 tax money or was the purchase price \$4227.88 out of which the tax money estimated to be \$163.43 was to be deducted, netting appellant \$4064.45?

It was the province of the jury to pass upon this controverted question of fact. *Rurup v. Chicago Consolidated Traction Co.*, 146 Ill. App.

436, and we do not find that their finding should be set aside as being manifestly against the weight of the evidence.

Plaintiff's Exhibit No. 5 was the certificate of purchase which was the subject of sale to appellee. There was no error in its admission in evidence.

Finding no reversible error in the record, the judgment is affirmed.

Judgment Affirmed.

Not to be reported in full.

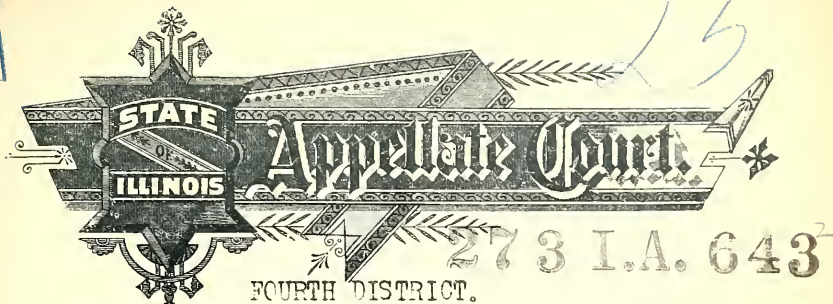
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DEC 26 1933

Walter M. Buckham

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS





OCTOBER TERM, A. D. 1933.

TERM NO. 3.

AGENDA NO. 2.

W. W. BOYNE, CORONER
MIDWEST KENNEL CLUB
ILLINOIS MISSOURI
GREYHOUND BREEDERS
ASSOCIATION and
CAHOYIA AMUSEMENT
COMPANY,

Plaintiffs in Error.

vs.

JEROME MUNIE, SHERIFF
OF ST. CLAIR COUNTY,
Defendant in Error.

Error to

Circuit Court

St. Clair County.

STONE, J:

On July 27, 1933, plaintiffs in error filed their Bill for Injunction in the City Court of East St. Louis, against Jerome Munie, Sheriff of St. Clair County, Illinois, and Louis F. Zerwick,

States Attorney of St. Clair County. On the same day a temporary injunction was issued restraining the said Munie as Sheriff and the said Zerwick as States Attorney, from any interference with complainants in the carrying on at their race course the business of buying and selling grey hounds, selling options, etc. Thereafter, on the 7th of August, the sheriff visited the race course in question and made certain arrests. Plaintiffs in Error then filed a petition for citation in the City Court of East St. Louis, seeking a rule on said sheriff to show cause why he should not be attached as for contempt of court, claiming that the acts of said sheriff in making the aforesaid arrests were a violation of the court's injunction. The court issued its writ of attachment directed to W. W. Boyne, Coroner of St. Clair County, commanding him to take Jerome Munie, Sheriff of St. Clair County, Illinois, and bring him before said court to answer unto the People of the State

of Illinois, for an alleged contempt of court. The coroner arrested the sheriff upon said writ and held him in custody. Upon the petition of said sheriff, the Circuit Court of St. Clair County issued a writ of habeas corpus, commanding the coroner who held the sheriff in custody to bring him before said court, together with the cause of his imprisonment, that the same might be inquired into by the court. Upon the hearing, the court discharged the sheriff from custody of the coroner. From the judgment of said court in so discharging the sheriff plaintiffs in error have sued out this writ of error.

As this writ of error must be dismissed because it will not lie in this character of case, we are not concerned as to whether the trial court erred in discharging the relator. Our Supreme Court has repeatedly held that no appeal or writ of error lies to review the action of a trial court in habeas corpus seeking the discharge of a prisoner in a criminal case as it is

not a final order.

In *People vs Siman*, 284 Ill. 28, our Supreme Court said:

"It is now the well established doctrine of this court that no writ of error lies to review the order or judgment of a court or judge in a habeas corpus proceeding for the discharge of a prisoner in a criminal case, as the order or judgment in such a proceeding is not a final order or judgment, and that such an order or judgment cannot be pleaded as a bar to another such proceeding. No appeal from such an order or judgment has been granted by any Statute in this State, and consequently no appeal is permissible from such an order or judgment. The reasons for the adoption of such holding have been so fully discussed and so frequently decided by this court as to require no further discussion or comment thereon in this case."

Hammond v People, 32 Ill. 446; *Ex parte Thompson*, 93 id. 89; *Cormack v Marshall*, 211 id. 519; *People v McAnally*, 221 id. 66.

The case at bar comes within the scope of the above decisions. The writ of error is dismissed.

Writ dismissed

Not to be reported in full.

FILED
DEC 26 1933



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 28.

AGENDA NO. 29.

SCHROEFPPEL UNDER-
TAKING COMPANY
Appellant,

vs.

JOHN HOFFMAN,
Appellee.

Appeal from
Circuit Court
Madison County.

STONE, J:

This case comes before us on an appeal from a judgment in favor of Hoffman against appellant, on a declaration charging negligent operation of an automobile ambulance, the argued objections to the judgment being that the judgment is based on a verdict manifestly contrary to the preponderance of the evidence both as to negligence

of defendant and due care of plaintiff, and that the evidence shows contributory negligence as a matter of law, on the part of plaintiff.

The undisputed facts are that appellant's ambulance, travelling westward on a main paved highway which ran almost east and west through Fairmount City, collided with Hoffman and injured him, while he was on foot, at about 8:30 P. M., December 30, 1932. The ambulance was carrying a patient to the hospital, but not in any emergency. The pavement at the point of the accident was eighteen feet wide, or more. On the south side of the pavement there was a dirt shoulder thirty to forty feet wide, the north shoulder being about five or six feet in width.

The highway carried steady traffic. A wire carrying a high-tension electric current had broken about thirty minutes before the accident, and lay with the ends near each other so as to cause a continuous sparking. Occasional-

ly the ends fused or touched, producing a blinding flash. Perhaps two hundred people had gathered along the highway watching the broken wire, most of them on the south shoulder, but with some on the north side of the pavement. The vehicle traffic was not stopped.

Hoffman, who lived about a block from the scene of the accident, came to look at the fire. He had been present for some time, standing near the south side of the south shoulder, some ten feet or more from the wires, when there was a blinding flash. The crowd moved back from the wires and toward the north. He says he walked rapidly toward the pavement, looking toward the approaching ambulance as he started, but seeing nothing of it. He says he had taken one or two steps on the pavement when he was struck. The crowd was moving with him to the pavement. He was in advance of those who had been standing near him. It is uncertain whether he was at the front of the crowd.

The driver of the ambulance saw the crowd at some distance from it, and saw the flashing from the broken wire. The crowd was clearly visible from the ambulance, and the lights of the ambulance were clearly visible to members of the crowd.

There is dispute about the speed of the ambulance as it approached and entered the crowd, the estimates of witnesses varying from five to eight miles an hour up to thirty-five miles an hour. The physical injuries of plaintiff would tend to indicate that the speed was greater than the lower estimate given. There were public electric lights burning along the highway which disclosed the situation and the crowd.

As this record discloses that the driver of the ambulance saw a considerable crowd close to if not upon the pavement, gathered about a display so unusual that it was likely to attract all the attention of some of them with the probability that some of the persons in the crowd

would not be attentive to traffic, or would take for granted that the presence of the crowd would control the vehicle traffic, and discloses substantial evidence that the ambulance went through the crowd at a speed which prevented complete control of it, we hold that it was within the province of the jury to find that appellant was chargeable with negligence in the operation of the ambulance.

Looking to the proof of care on the part of plaintiff, the rough facts that Hoffman knowingly entered upon a much travelled pavement into the path of a moving automobile with headlights burning, would appear to bring the case within the class of Illinois Central Railroad vs Oswald, 338 Ill. 270, and similar cases cited for appellant, where stepping into a place of known danger was held to be contributory negligence as a matter of law, and those cases including Mannen vs Norris, 338 Ill. 322, where it is said that courts cannot accept the statement that one look-

ed and did not see, where to look was to see.

If the conduct of this plaintiff falls in that class it is our duty to apply the rule of those cases. However, it is equally our duty to examine the conduct of the plaintiff in the light of the circumstances disclosed about this situation, so that we shall not by too rough classification, decide as law that which many unbiased and reasonable minds would consider to be a fairly debatable matter of fact.

The plaintiff was acquainted with the place where he stood. He knew that about and along the highway there was a crowd of about two hundred people, well lighted by the electric lamps in the vicinity. The sparking and flashing of the broken wire was a notice to drivers of vehicles that something unusual was occurring at this point. Reasonable minds might fairly decide that the practice of careful control of automobiles in approaching such

a situation clearly visible to a driver for several hundred feet, is so common that one in such a crowd at such a scene might reasonably have an unconscious sense that it was so, and thus have less acute his sense that the pavement was a place of great danger. Hoffman, some ten feet from the broken wire, saw it flash several times. He started toward the pavement immediately after the last flash. The flashes are described by all witnesses as blinding. Hoffman does not say he was blinded by the flash. He does say he looked toward the headlights of the ambulance but did not see them. The crowd about him surged away from the wire and toward the pavement at the instant of this flash, according to evidence which a jury might believe.

To hold even that the finding of the jury is contrary to the manifest preponderance of the evidence, and that the case must be retried, without reducing the situation to a matter of law, we must try to suppose what factors favor-

able to the view that Hoffman was duly careful for himself the jury could find. Assume that a jury found it most probable that Hoffman, startled by the last flash he saw, moved by the surge of the crowd toward the pavement, looked toward the advancing ambulance, failed to see it because of some passing obstruction or because without his knowledge he was temporarily blinded to light by the flash, believed he knew the pavement was clear of traffic; that he was given confidence of safety on the pavement by the common movement of his fellow human beings toward the pavement, and then that the jury decided that in all this Hoffman was not doing or neglecting any action for his own safety that was contrary to the conduct to be expected from ordinarily prudent persons in his position. All of this would be within the evidence and inferences therefrom and acceptable to many reasonable minds.

Remembering that we are not to intervene

unless the weight of evidence against a verdict is manifest, obvious. unmistakeable, we do not feel justified in interfering under the circumstances shown by this record with the finding of the jury that Hoffman was exercising the care for his own safety to be expected of a reasonably prudent person, on the occasion of his injury.

It follows that we do not hold he was guilty of contributory negligence as a matter of law.

Judgment affirmed.

Not to be published in full.

FILED

DEC 26 1933

Walter M. Buchanan

CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS



FOURTH DISTRICT.

OCTOBER TERM, A. D. 1933.

TERM NO. 33.

AGENDA NO. 26.

IVA RAGLAND

Defendant in Error,

vs.

A. T. RAGLAND,

Plaintiff in Error.

Error to

City Court of

West Frankfort.

STONE, J:

This is a writ of error by A. T. Ragland to reverse a decree for divorce of the City Court of West Frankfort in favor of Iva Ragland.

Defendant in error files pleas to the writ by which she asserts that A. T. Ragland is in contempt of the trial court because he has not paid alimony and expense money to her as directed

by that court.

Amended replications are filed on behalf of A. T. Ragland asserting that no judgment of contempt has been properly entered against him because (1) he was not served with notice of the application against him charging contempt, and was not heard on the allowance of the greater part of the awards made against him, and (2) because he asserts that the order finding him in contempt was not entered on the date it bears, before his writ of error was sued out, but at a later time, by a judge whose authority to sit in that court does not appear.

Counsel for Iva Ragland demur to the replications.

If plaintiff in error was in contempt of the court entering the decree as he is charged, he cannot prosecute this writ of error. GARRETT v. GARRETT, 341 Ill. 232.

On November 16, 1931. the court after a

hearing, directed A. T. Ragland to pay \$50.00 to his wife Iva Ragland, to enable her to prosecute her bill for divorce. The record shows that he refused to pay. By the decree for divorce entered later he was ordered to pay the costs of suit and \$25.00 per month for the support of his wife and a daughter eleven years old. By a further order of the court he was directed, after this writ of error was sued out, to pay \$250.00 to enable her to defend against the writ of error. He has paid nothing. He has made no application to the court below for a review of the orders directing him to make payments for the benefit of his wife and child. The trial court found that he was evading process of that court, and the record shows an attachment outstanding against him for contempt of court in failing to make payments ordered by the court, which the sheriff has been unable to serve on A. T. Ragland.

The pleas to the writ of error state a con-

tempt and they are supported by the record. The replications are not sufficient to purge plaintiff in error of the contempt, even if all the allegations therein could be accepted by this court, as they do not deny knowledge of the orders entered by the City Court of West Frankfort, after their entry, with full opportunity to ask that court to modify any injustice in the order, and do not cover at all the refusal to pay the item of \$50.00 first ordered by the court. So far as the replications deny a contempt of the trial court, they rest upon an attack on the truthfulness of the transcript of record filed in this court.

"The general rule is that the record of a court imports absolute verity. and cannot be corrected or amended except by other matters of record made by or under authority of the court."

NICHOLSON v. LOEFF, 253 Ill. 526, 527.

The record cannot be impeached by testimony, affidavits, stenographic report or the memory of the judge. PEOPLE v AMBOLO, 343 Ill. 480, 482.

The trial court had authority to direct plaintiff in error to pay a reasonable amount to defendant in error to enable her to defend against this writ of error, under Section 16 of the Divorce Act.

The demurrer to plaintiff in error's replications to defendant in error's pleas is sustained.

The trial court is in better position than this court to determine what equity requires to purge plaintiff in error of contempt. His present ability to pay the amounts now unpaid is a question proper for that court to consider. No evidence on that subject is preserved for our inspection.

As his answer to the original bill was rejected by the trial court on his first contempt



III. Unpublished opinions

273

77239

Borrower who signs this card is responsible for
the return of the book.

Not Transferable.

Not Transferable.
Not to be taken from the Reading Room.

Sign legibly.

Obey these rules and avoid fines.

Date _____

Name _____

~~Name~~
~~R. Collier~~
~~Nov 3-31~~

~~AN~~ 3-3280

1/15/81

D. G. Gentry

323 4608

